No. ________

In The

Supreme Court of the United States

BEACH GROUP INVESTMENTS, LLC,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Fourth District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under *Williamson County*'s "final decision" requirement, a landowner must re-submit and have denied alternative, economically impracticable development plans to ripen a regulatory taking claim.

2. Whether *Williamson County*'s "final decision" requirement establishes a *per se* rule that a landowner must apply for a variance to ripen a regulatory taking claim, even where such variance is not authorized or, if authorized, was found to have been futile to pursue.

PARTIES TO THE PROCEEDING

Beach Group Investments, LLC ("Beach Group") is the petitioner here and was the plaintiff-appellee below.

State of Florida, Department of Environmental Protection ("DEP") is the respondent here and was the defendant-appellant below.

CORPORATE DISCLOSURE STATEMENT

Beach Group is a 100% wholly owned subsidiary of Ocean Breeze Townhomes, LLC. Both entities are privately held and no publicly-held company owns 10% or more.

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INTRODUCTION

With respect to *Williamson County*'s "final decision" requirement, the eminent regulatory taking scholar and practitioner, Michael M. Berger, recently observed that "[a]lthough the idea of seeking a variance seems hard to dispute in the abstract, it can cause problems in particular cases." Michael M. Berger, *The Ripeness Game: Why Are We Still Forced To Play?*, 30 Touro L. Rev. 297, 304 (2014).

This case underscores those problems. Here, Beach Group spent substantial sums to acquire very expensive oceanfront property zoned for a 17-unit townhome project. After Beach Group perfected all other necessary land use approvals, DEP then denied Beach Group the one last permit it needed by changing its coastal building setback policies and practices. After being told by DEP that it would neither change its mind nor grant a variance to allow the only economically feasible development of the property, Beach Group lost the property through foreclosure, and one of its principals was saddled with a nearly $10 million personal judgment. Beach Group then sued DEP for a regulatory taking. After a bench trial, the trial court found a taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). After a jury trial, the jury awarded Beach Group $10.418 million and final judgment was entered.

The court of appeal reversed the final judgment on ripeness grounds holding that Beach Group should

have applied for a variance and for lesser development alternatives. It so held despite that: (1) DEP lacked discretion to grant the variance cited by the court of appeal; (2) the trial court found that pursuit of such variance would have been futile based on the history of the parties and the stated views of DEP; and (3) lesser development alternatives were economically impracticable.

Beach Group respectfully petitions for a Writ of Certiorari to review the judgment of the Florida Fourth District Court of Appeal in this case.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal is reported at 201 So. 3d 679 (Fla. 4th DCA 2016) and reprinted in the Appendix (App.) at App. 1-18. The trial court's order of taking is not reported but is reprinted at App. 20-49. The DEP's final order denying Beach Group's Coastal Construction Control Line permit application is not reported but is reprinted at App. 50-105.

JURISDICTION

The court of appeal opinion from which review is sought was rendered on August 3, 2016. On September 16, 2016, Petitioner timely filed a motion for rehearing of the court of appeal opinion which was denied. (App.

19, 155-85). On November 16, 2016, Petitioner timely sought discretionary review of the court of appeal's opinion before the Florida Supreme Court, which denied review on March 30, 2017. (App. 106). Beach Group's application for extension of time to file a petition for writ of certiorari was granted on June 1, 2017, extending the time for filing to August 12, 2017.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The relevant portions of the Florida Beach and Shore Preservation Act, Chapter 161, Florida Statutes at issue are sections 161.053 and 161.151. The relevant agency rules implementing Chapter 161, Florida Statutes are Rules 62B-33.005 and 62B-33.024, Florida Administrative Code. These statutes and rules are reproduced verbatim, in relevant part, in the Appendix at pages 113-36 and 137-54, respectively. Section

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[1] August 12, 2017 is a Saturday making the filing deadline Monday, August 14, 2017 under Rule 30.1.

120.542, Florida Statutes governs the authority to grant variances from state agency rules. This section is reproduced verbatim in the Appendix at pages 108-12.

STATEMENT OF THE CASE

A. Factual Background

1. The Property, Its Zoning And Its Acquisition

Ocean Breeze Townhomes, LLC purchased Beach Group in July 2005 for $8,718,440. Beach Group's sole asset consisted of 2.16 acres of Atlantic Ocean beach frontage in Fort Pierce, Florida (the "Property"). Before purchasing the Property, Ocean Breeze performed due diligence confirming that the Property's zoning allowed for construction of seventeen luxury townhome units (the "Project"). Beach Group ultimately obtained site plan approval for the Project from the City, along with other necessary permits from the DEP and Florida Department of Transportation.

2. DEP's Coastal Construction Control Line Permitting Program And Practices

The Project also required a permit from DEP pursuant to Florida's Beach and Shore Preservation Act, Chapter 161, Florida Statutes. The Act mandates establishment of "coastal construction control lines"

("CCCLs"), which "define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions." § 161.053(1)(a), Fla. Stat. (2006). Once a CCCL is established, no construction seaward of that line may occur without first obtaining a CCCL permit from DEP. Pursuant to the Act, DEP was prohibited from issuing CCCL permits for a structure in a location that is "based on the [DEP]'s projections of erosion in the area, . . . seaward of the seasonal high-water line within 30 years after the date of application for the permit." § 161.053(6)(b), Fla. Stat. (2006). The procedures for determining erosion are set out in Rule 62B-33.024, Florida Administrative Code.

Ocean Breeze retained a coastal engineer before purchasing the Property. Based on his past CCCL permitting experience in the area and communications with DEP about the Project, the engineer confirmed that the Project would qualify for a CCCL permit consistent with DEP's past and then current 30-year erosion projection setback policies and practices which recognized an existing line of continuous construction of other buildings in the area.

B. Procedural Background

1. DEP Changes Its Policies And Practice, Indicates No Variance Is Available To Allow The Project And Denies Beach Group's CCCL Permit To Construct The Project

In December 2005, Beach Group submitted a CCCL permit application to DEP for the Project. Two months later, while Beach Group's application was pending, the State of Florida Coastal High Hazard Study Committee issued a report recommending that DEP strengthen setback requirements for the CCCL permit program.[2]

In August 2006, DEP provided Beach Group with its preliminary setback calculations based on a new starting point for the 30-year erosion projection that was the most landward option available, and was significantly farther landward than the starting point DEP had historically utilized. (App. 7-8, 37-40). This change in policy and practice rendered the Project unpermittable under section 161.053(6)(b), Florida Statutes (2006) (prohibiting location of major structures seaward of DEP's 30-year erosion projection). (App. 37-40).

Beach Group met with DEP officials in hopes of convincing DEP to follow its past practice, but DEP

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[2] The report also recognized that changing the setback requirements ". . . may result in economic impacts, both by restricting a property owners' ability to construct on a parcel and to the State through potential ***increased takings claims***." (emphasis added).

made it clear that it would not change its mind, and had no intention of issuing a permit for the Project. (App. 12-13). As generally required by statute, DEP mentioned the possibility of a variance.[3] Section 120.542, Florida Statutes authorizes state agencies, such as DEP, to issue variances or waivers from agency rules. However, it also expressly prohibits variances from state statutes.[4] Shortly thereafter, DEP advised Beach Group that a variance would not be granted. (App. 13, 40). In November 2006, DEP notified Beach Group that it intended to deny the CCCL permit application.

Beach Group then pursued formal administrative proceedings before an administrative law judge ("ALJ"). While concluding that the Project otherwise satisfied the applicable CCCL permit criteria, the ALJ nevertheless recommended denial of Beach Group's permit application because the Project extended seaward of the 30-year erosion projection setback based on his selection of yet a third starting point for the 30-year erosion projection. (App. 83-87).

Beach Group argued during the administrative proceedings that the likelihood of continued beach nourishment beyond the existing 2021 renourishment

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[3] Section 120.542(4), Florida Statutes requires state agencies to advise permit applicants of the potential availability of variances or waivers. (App. 109-10).

[4] Section 120.542(1), Florida Statutes provides that "[t]his section does not authorize agencies to grant variances or waivers to statutes. . . ." (App. 108).

project life should be considered in calculating the erosion projection given the history of continued renourishment since 1971. (App. 95-96). The ALJ rejected this argument, however, based on the Florida statute governing the circumstances under which future nourishment can be considered. (App. 96). It provided:

> In determining the land areas that will be below the seasonal high-water line within 30 years after the permit application date, the department shall consider the effect on erosion rates of an existing beach nourishment or restoration project or of a beach nourishment or restoration project ***for which all funding arrangements have been made and all permits have been issued at the time the application is submitted.***

§ 161.053(6)(d), Fla. Stat. (emphasis added).

The ALJ thus concluded that it would be contrary to Section 163.053(6)(d) to allow for consideration of renourishment projects that would not be considered "existing" under Rule 62B-33.024(2)(d)1., Florida Administrative Code. (App. 96-97). Under the rule, which tracks Section 163.053(6)(d), a renourishment project is considered to be "existing" only "***if all funding arrangements have been made and all permits have been issued at the time the application is submitted***." Rule 62B-33.024(2)(d)1., Fla. Admin. Code (emphasis added). (App. 96-97). Nevertheless, in footnote 13 to his recommended order, the ALJ commented, in clearly equivocal fashion, that a variance or waiver

"***might*** be appropriate" based on the likelihood of continued beach nourishment.[5] (App. 105). (emphasis added). On July 11, 2007, DEP entered a final order adopting most of the ALJ's findings and conclusions and denying the permit. (App. 50-67). Beach Group's counsel, a former DEP lawyer, advised Beach Group at the time that a variance from the statute was not available under Florida law. (App. 41, 182-85).

2. Beach Group Loses The Property And DEP Informs The New Owner That No Variance Is Available To Allow Beach Group's Former Project

Thereafter, in 2010, Beach Group lost the property to its lender in separate litigation, and an approximate $10 million personal judgment was entered against one of Beach Group's principals who guaranteed the acquisition loan. (App. 9, 44).

In 2010, the new owner of the Property asked DEP's CCCL permit program administrator if there was any opportunity for a variance to accommodate Beach Group's prior Project plan to which the administrator replied: "The DEP cannot issue permits for major structures except certain single-family dwellings located seaward of said line. This is state law, ***which you cannot obtain a variance from***." (emphasis added). (App. 10-11).

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[5] As noted, section 120.542, Florida Statutes ***generally*** required the ALJ to advise Beach Group of the availability of variances or waivers.

C. State Trial Court Proceedings

In March 2011, Beach Group brought an as-applied regulatory taking claim against DEP. DEP argued that the claim was not ripe because Beach Group failed to apply for a waiver or variance to allow the Project and because DEP claimed there were other permissible uses of the property. (App. 9-10).

The case proceeded to a non-jury trial on the taking issue. Beach Group's economist testified that, compared to the proposed 17-unit project, a smaller proposed development would have caused Beach Group to lose $10.5 million, or 96%, of the land's profitability. (App. 43). Beach Group's appraiser later testified at the valuation trial that the Property – assuming 17 units and the additional land use entitlements obtained by Beach Group – was worth $10.418 million as of the date of permit denial. DEP's appraiser testified that, after application of DEP's new 30-year erosion projection, the Property would bring a gross sales price of $3.5 million for eight units and $3.7 million for ten units. (App. 43).

At trial, DEP's CCCL permit program administrator acknowledged that a variance from the statute was not allowed. (App. 10-11). Contrary to his own prior representations to Beach Group's successor that no variance was available to allow Beach Group's Project, and also to DEP's final order concluding that consideration of future renourishment past 2021 would be inconsistent with section 161.053(5)(d), Florida Statutes,

he suggested that DEP could have granted an unspecified variance from the rule addressing calculation of the erosion projection thereby, in his words, making it "consistent with the statute." (App. 10). He did not explain how such unspecified variance would be somehow "consistent with the statute."

Following the non-jury trial, the trial court entered an order finding an as-applied regulatory taking of the property under *Penn Central*. (App. 22). The trial court found:

> (1) "Beach Group had a distinct and reasonable expectation in the development, use and sale at a profit of a seventeen-unit townhouse condominium project, based on . . . the [DEP's] published policies and historical practices." (App. 23);
>
> (2) "Beach Group suffered serious economic harm including loss of the initial [$8.72 million] land investment, loss of the opportunity to make a reasonable return on investment and loss of [$600,000] in out-of-pocket costs and development expenditures." (App. 23, 33, 35);
>
> (3) Beach Group's principal knew "that the only way that he could build and sell out the [P]roject at a profit was to obtain the permit for the 17 units that he had planned. . . ." (App. 35); and
>
> (4) DEP's bright-line regulatory policy change with regard to the erosion projection starting point caused Beach Group to lose this

> expectation, and to suffer "substantial deprivation of the economic use of its Property." (App. 23, 38).

The trial court further rejected DEP's ripeness defense, finding that: (1) "Beach Group . . . submitted a meaningful permit application"; and (2) "based on the evidence of the history between the parties and the stated views of FDEP [sic], it would have been futile for Beach Group to have separately applied for a variance." (App. 23-24). A jury trial on damages resulted in a $10.418 million verdict, and a final judgment was entered against DEP on July 31, 2014.

D. State Appellate Court Proceedings

DEP appealed the final judgment to the Florida Fourth District Court of Appeal. On August 3, 2016, the court of appeal issued its opinion rejecting the trial court's conclusion that Beach Group's claim was ripe, and concluding that Beach Group should have pursued a variance to allow for consideration of continued beach nourishment based on footnote 13 of DEP's final order. The court of appeal concluded that Florida Statutes authorized DEP to grant site-specific exceptions to its usual methods of calculating the 30-year erosion projection. (App. 15).

The court of appeal noted but did not pass on the trial court's finding that, in any event, it would have been futile for Beach Group to have pursued a variance.

The court of appeal then summarily denied Beach Group's motion for rehearing, where Beach Group argued that section 120.542(1), Florida Statutes (prohibiting variances from statutes) precluded the granting of the variance that the court of appeal suggested "might" have been available, because any such variance would have violated section 163.053(6)(d), Florida Statutes (limiting consideration of future renourishment). The court of appeal also held that Beach Group's taking claim was not ripe because Beach Group failed to propose a lesser alternative development plan although the court of appeal also found that "smaller developments would cause a loss." (App. 16-17).

The Florida Supreme Court denied review on March 30, 2017. (App. 106-07).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeal Decided An Important Federal Question That Has Not Been But Should Be Settled By This Court As To Whether Landowners Must Submit And Be Denied Economically Impracticable Development Plans To Ripen A Regulatory Taking Claim.

A. The Regulatory Taking Ripeness Doctrine Profoundly Affects Access To The Courts To Vindicate Taking Claims.

This Court's regulatory ripeness doctrine profoundly affects a party's ability to vindicate its constitutional right to be compensated for a regulatory taking. The ripeness doctrine requires that a landowner obtain a final decision from the agency on a meaningful application for development and, if that application is denied, to pursue any available variances or waivers unless to do so would be unfair or futile. These ripeness requirements enable a court to determine the full extent of a regulation's economic impact on the property in question.

Overly strict application of the ripeness doctrine, however, effectively enables government to deprive landowners of access to the courts to vindicate legitimate takings claims. It also encourages government to relegate landowners to a time-consuming, costly, repetitive and unfair procedural merry-go-round designed to avoid a final decision in hopes the landowner will eventually give up and just go away. *See, e.g.*, *Koontz v.*

St. Johns River Water Mgmt. Distr., 720 So. 2d 560, 562, n.2 (Fla. 5th DCA 1998) (where applicant had no other procedure left to realize the economic feasibility of his project, requiring further reapplications "would eventually discourage the owner so that he might just go away"); Timothy V. Kassouni, *The Ripeness Doctrine and Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 11 (1992) ("The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation.").

In recognition of this concern, the Court has made clear that: (1) government may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision *MacDonald Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350, n.7 (1986); and (2) once it becomes obvious that a regulatory authority lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a taking claim is likely to have ripened and the landowner is not required to submit further, futile applications just for their own sake in order to ripen his or her claim. *Palazzolo v. Rhode Island*, 533 U.S. 606, 621, 622 (2001).

B. Florida Courts Have Adopted This Court's Regulatory Taking Ripeness Precedent.

The Florida Supreme Court interprets the takings clauses of the United States and Florida Constitutions

coextensively. *St. Johns River Water Mgmt. Distr. v. Koontz*, 77 So. 3d 1220, 1226 (Fla. 2011). Though the Florida Supreme Court has never addressed regulatory taking ripeness, Florida appellate courts, including the court of appeal below, apply federal ripeness standards in deciding whether an as-applied regulatory taking claim is ripe.[6] Both the trial court and the court of appeal applied these standards below.

C. This Court's Regulatory Taking Ripeness Doctrine Does Not Require Landowners Whose Initial Development Plan Is Denied To Submit Further Futile Applications.

This Court held in *Williamson Cnty. Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985), that a regulatory taking claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981); *MacDonald Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 353 (1986).

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[6] *See Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995), *citing Dept. of Envtl. Reg. v. MacKay*, 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989); *City of Jacksonville v. Wynn*, 650 So. 2d 182, 186-88 (Fla. 1st DCA 1995); *Lee Cnty. v. Morales*, 557 So. 2d 652, 654 (Fla. 2d DCA 1990); *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1179-80 (Fla. 4th DCA 1985).

The underlying rationale of the Court's final decision requirement is that the economic impact of the regulation and the extent to which it interferes with investment-backed expectations "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson*, 473 U.S. at 191. This means that, in most instances, in order to ripen a regulatory taking claim, a landowner whose development plan has been denied must also apply for and receive denial of any available variances from the regulations upon which the denial was based. However, this Court also has recognized that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures" in order to obtain a final decision. *MacDonald*, 447 U.S. at 350, n.7.

What constituted "unfair procedures" under *MacDonald*, how definitive a local government's decision must be to be considered "final," and what limitations exist on the requirement that a landowner pursue additional administrative relief remained unclear. And despite this Court's admonition in *MacDonald*, there was both growing confusion and inconsistency in the judiciary. Indeed, as one court noted, "[t]he deficiencies of the ripeness standard . . . are most apparent with regard to the 'futility exception.'" *Eide v. Sarasota Cnty.*, 908 F.2d 716, 727 (11th Cir. 1990) (Shoob, J., concurring). As a result, there was general recognition amongst commentators that landowners' constitutional rights were being placed at risk by governmental creation of procedural hurdles that effectively

prevent landowners from bringing legitimate taking claims in court.[7]

While this Court began to address these concerns in *Suitum v. Tahoe Regl. Planning Agency*, 520 U.S. 725 (1997) and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), these concerns remain.

In *Suitum*, the Court held that the additional agency action of the sort demanded by *Williamson County* was not required because the agency possessed no discretion over use of the owner's land that lay entirely within a special protection zone and could not be developed. *Id.* at 739. The Court distinguished its *Williamson County* precedents as addressing the very different scenario involving "the virtual impossibility of determining what development will be permitted on a

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[7] *See* William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After* Palazzolo v. Rhode Island, 46 St. Louis U. L. J. 833, 856 (Summer 2002) ("Agencies know that ripeness requirements make it difficult, if not nearly impossible, for landowners to bring regulatory taking claims in court. . . . Not surprisingly, ripeness has been referred to as 'the landowner's nemesis and the municipality's best friend.' "); Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Protection Act*, 47 Fla. L. Rev. 411, 412 (July 1995) ("As a result of the rigidity of the ripeness doctrine and confusion in the judiciary, the ripeness requirements in the land use context have created an almost impenetrable wall between landowners and the judicial system."); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Court*, 48 Vand. L. Rev. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small.").

particular lot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not yet even been asked to exercise." *Id.* at 739-40.

Suitum addressed the situation where the government had no discretion to allow development. This Court in *Suitum* expressly set aside "the question of how definitive a local zoning decision must be to satisfy *Williamson County*'s demand for finality." *Id.* at 738.

In *Palazzolo*, this Court addressed the situation where the agency had denied several of the landowner's prior applications to fill in and develop wetlands, but still retained some, albeit limited, residual discretion to allow some development within wetlands by "special exception" upon demonstration that the proposed activity would serve a compelling public purpose providing "benefits to the public as a whole as opposed to individual or private interests." The agency denied the landowner's latest application because it conflicted with this standard. *Id.*

The Rhode Island Supreme Court found the landowner's regulatory taking claim unripe, reasoning that despite the agency's denials, doubt remained as to the extent of development that would be allowed in light of the landowner's failure to explore other uses of the property that filled substantially less wetlands. This Court reversed, concluding that any such doubt "was belied by the unequivocal nature of the wetland regulations at issue and by the agency's application of the

regulations to the subject property." *Id.* at 619. Citing *Suitum*, the Court noted:

> "Williamson County's final decision requirement responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer." (citation omitted). While a landowner must give a land-use authority an opportunity to exercise its discretion, ***once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a taking claim is likely to have ripened.***"

Id. at 620 (emphasis added). Once again, the Court emphasized that "[g]overnmental authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision," *Id.* at 621, or "require a landowner to submit applications for their own sake." *id.* at 622 (citing *MacDonald*).

D. The Court of Appeal's Requirement That Beach Group Reapply For Economically Impracticable Lesser Development Alternatives Impliedly Conflicts With *MacDonald* And Raises An Important Federal Issue That Has Not Been, But Should Be, Settled By This Court.

Citing *MacDonald*, the court of appeal here held that Beach Group's taking claim was not ripe because Beach Group "could have considered alternative plans for the property." (App. 17). The genesis of the court of appeal's "reapplication" requirement appears to be a footnote in *MacDonald* wherein this Court noted: "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353, n.9; *see also Penn Central*, 438 U.S. 104, 136-37 (1978) (rejecting taking claim and noting that other permissible uses of property were available to owner). Thus far, this Court has declined to address the suggestion in *MacDonald* that "the *Williamson* 'final decision' requirement might sometimes require multiple proposals . . . before a landowner's case will be considered ripe." *Suitum*, 520 U.S. at 738, n.12. However, a number of state and federal appellate courts, including Florida intermediate appellate courts, have adopted the reapplication requirement.[8]

[8] *See, e.g.*, *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1291 (3d Cir. 1993); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992); *Exec. 100, Inc. v. Martin Cnty.*, 922 F.2d 1536, 1540-41 (11th Cir. 1991); *Herrington v. Sonoma Cnty.*, 834

The purpose of the *Williamson County* final decision requirement is to allow determination "of the effect the . . . application of the zoning ordinance and subdivision regulations have on the value of respondent's property and investment-backed profit expectation." *MacDonald*, 477 U.S. at 350 (quoting *Williamson*, 473 U.S. at 185). Once that effect is known, however, it seems obvious that submission of further development plans becomes pointless, especially if such plans would not be economically practicable.

This case squarely presents this unresolved issue.

1. Less Ambitious Development Alternatives For Beach Group Were Not Economically Practicable.

The court of appeal's determination here that Beach Group should have submitted a less ambitious development plan is belied by the record below. There was nothing grandiose about the 17-unit Project; after all, it was consistent with the existing zoning and had received multiple other land use approvals.[9] Moreover, the trial court found that the only way to profitably

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F.2d 1488, 1497 (9th Cir. 1987); *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 570 (Fla. 4th DCA 2002); *Sprint Spectrum L.P. v. City of Carmel, Indiana*, 361 F.3d 998, 1002, 1004-05 (7th Cir. 2004); *Killington, Ltd. v. State*, 164 Vt. 253, 262-63 (1995).

[9] As one commentator observes, it does not "comport with common sense or rational law" to require reapplication where, as here, the landowner "seek[s] to develop land precisely in accordance with applicable planning and zoning." Berger, 30 Touro L. Rev. at 302-03.

build-out and sell the Property was if DEP approved the CCCL permit for the 17-unit Project. This fact is confirmed by DEP's own appraiser who testified that use of the remaining buildable portion of the Property would bring a gross sales price of only $3.5 million for eight units and $3.7 million for ten units as compared to the $8.72 million purchase price paid for the Property. This fact is further confirmed by the trial court's citation to expert testimony that a smaller proposed development would have caused Beach Group to lose $10.5 million or 96% of the land's profitability. The court of appeal itself acknowledged this testimony, finding that "[t]he property had some value, but smaller developments would cause a loss." (App. 12, n.9). Thus, here, there was no question that lesser development alternatives would have been economically impracticable.

2. Where, As Here, Less Ambitious Development Alternatives Were Not Economically Practicable, The Court of Appeal's Reapplication Requirement Violates *MacDonald*'s Admonition That A Property Owner Is "Not Required To Resort To . . . Unfair Procedures In Order To Obtain [A Final] Determination."

Whatever may be the outer limits of the ripeness "reapplication" requirement, it cannot reasonably require landowners, whose meaningful development plan has been denied, to commit economic suicide by pursuing less ambitious economically impracticable

development plans in order to ripen their regulatory taking claim. This Court implied as much in *MacDonald* by noting that the landowner there had not "contend[ed] that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." *MacDonald*, 477 U.S. at 252, n.8. The United States Court of Claims has explicitly so concluded:

> The ripeness requirement should not oblige a landowner to seek a permit for a development proposal that it does not deem economically viable and, hence, does not intend to undertake. To the extent that the government disagrees with the landowner's conclusion as to the economic viability of development proposals left open by an agency decision, it can present its arguments to the court considering the merits of the taking claim.

Buere-Co. v. United States, 16 Cl. Ct. 42, 51, n.11 (1988); *Devon Energy Corp. v. United States*, 45 Fed. Cl. 519, 528 (1999) (quoting same language).

The Texas Supreme Court appears to be the only appellate court to have addressed this issue. In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (1998), the town denied the landowner's proposed 3,600 unit development plan. *Id.* at 931. The Mayhews "alleged that anything less than approval for 3,600 units on their property constitutes a regulatory taking" because it would "deny the only economically viable use of their property." *Id.* at 931, 932. The town argued, as the court of appeal held here, that the claim was not ripe "because the Mayhews submitted only one planned

development application and did not thereafter reapply for development or submit a 'variance.' " *Id.*

The Texas Supreme Court disagreed, noting first that "[t]he United States Supreme Court has indicated that [a regulatory taking] claim may be ripe without the necessity of seeking a variance or filing a subsequent application." *Id.* at 931 (citing *MacDonald*). The court then held that "[t]he ripeness doctrine does not require a property owner, such as the Mayhews, to seek permits for development that the property owner does not deem economically viable." Again citing *MacDonald*, the court reasoned:

> Any other holding would require the [landowners] to expend their own time and resources pursuing, and the Town's time and resources considering, a development proposal that the [landowners] would never actually develop. Requiring such a wasteful expenditure of resources would violate the Supreme Court's admonition that a property owner is "not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination."

Id. at 932 (citing *MacDonald*, 477 U.S. at 352, n.7).

Short of deprivation of all economically beneficial use, it is hard to imagine a scenario where there is not, in theory, at least ***some*** lesser development alternatives available to any landowner whose initial plan of development has been denied. Thus, the rule announced by the Texas Supreme Court in *Mayhew* and implicitly endorsed by this Court in *MacDonald* is

necessary to avoid placing landowners on the very procedural merry-go-round this Court in *MacDonald*, *Suitum* and *Palazzolo* seeks to avoid. Under this rule, whether the landowner can ultimately prove that a taking has occurred will depend on proof at trial, ***but at least, where less ambitious alternative developments are not economically practicable, he or she will have their day in court.***

Here, the court of appeal required Beach Group to reapply for economically impracticable lesser development alternatives. Its decision effectively: (1) guarantees that landowners will rarely, if ever, be able to ripen a *Penn Central* regulatory taking claim; and (2) deprives landowners access to the courts to vindicate their rights under the Fifth and Fourteenth Amendments. Accordingly, this Court should grant the writ to clarify and enforce the Court's important admonition and implicit holding in *MacDonald* and provide further guidance on this important issue to the lower courts.

II. The Court Of Appeal Has Decided An Important Federal Question That Conflicts With This Court's Regulatory Taking Ripeness Decisions By Holding That Landowners Must Always Submit And Be Denied Variances To Ripen A Regulatory Taking Claim.

A. The Court Of Appeal's Decision Conflicts With *Macdonald*, *Suitum* And *Palazzolo* Because DEP Was Powerless To Grant The Variance The Court Of Appeal Held Beach Group Should Have Pursued.

1. DEP Was Not Authorized To Grant The Variance Cited By The Court Of Appeal.

The court of appeal also held that Beach Group should have applied for a variance to allow for consideration of continued beach renourishment past 2021. In so doing, the court effectively adopted an extreme rule requiring pursuit of a variance even where the agency is powerless to grant it. Such a requirement squarely conflicts with this Court's holding in *Suitum* and *Palazzolo* relieving a landowner from pursuing any further administrative procedures where the agency lacks meaningful discretion over use of the land in question.

Here, DEP considered it "reasonable to expect that beach nourishment south of the inlet will continue for the foreseeable future." (App. 96). However, DEP was powerless to grant the variance relied on by the court

of appeal because: (1) it was undisputed that renourishment funding arrangements and permits were not in place past 2021 at the time Beach Group applied for its CCCL permit; (2) section 161.053(6)(d), Florida Statutes precluded consideration of future renourishment where funding arrangements had not been made and permits issued at the time of permit application; and (3) section 120.542, Florida Statutes expressly states that variances from statutes are not authorized. Thus, DEP lacked discretion to grant the variance the court of appeal held Beach Group should have pursued.[10]

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[10] This Court has not hesitated to make "independent evaluation of state law in order to protect federal . . . guarantees" and often independently analyzes state law to determine whether there has been a violation of the Takings Clause. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 115, n.1 (2000) (Rehnquist, J., concurring) (*citing Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). This willingness to independently evaluate state law clearly extends to the ripeness of regulatory taking cases. *See Williamson*, 473 U.S. 172 (evaluating the availability of variances to provide relief from denial of development plan); *MacDonald*, 477 U.S. 340 (evaluating grounds for denial of initial development plan and availability of other alternative uses); *Suitum*, 520 U.S. 725 (evaluating state special protection regulations to determine futility of applying for approval of transferable development rights); *Palazzolo*, 533 U.S. 606 (evaluating state wetlands protection law to determine futility of further permit applications).

2. Pursuit Of The Variance Cited By The Court Of Appeal Would Have Been Futile.

Ripeness does not require the submission of "further and futile" applications. *Palazzolo*, 533 U.S. at 620, 625-26; *see also Suitum*, 520 U.S. at 739. Here, DEP conducted a site-specific approach, applying the regulations at issue to the particular land in question, affording the greatest recognition possible to continued future beach renourishment without violating the express terms of the statute, and concluded that Beach Group was not entitled to a permit. DEP had no further discretion to grant a variance from its final decision and, thus, the permissible uses of Beach Group's Property were known "to a reasonable degree of certainty." Any further development applications would have been futile, as the trial court found and as DEP itself confirmed when it advised the subsequent owner of the Beach Group property that a variance was not available to allow the Project. The court of appeal's requirement that Beach Group do more under these circumstances disregards this Court's holdings in *MacDonald, Suitum* and *Palazzolo*, and would have unfairly placed Beach Group on the very regulatory merry-go-round that the Court has deemed unfair and unnecessary.[11]

[11] According to one commentator, this court of appeal's futility decisions in particular have "provided little shelter from the landowner's trek through the bureaucratic and judicial ripeness maze," granting the futility exception "only when the landowner is informed that the 'proposed project was dead' and the agency

The case most factually similar to the instant case appears to be *City of Coeur D'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006), in which the Idaho Supreme Court held that the landowners were not required to apply for an available variance in order to ripen their taking claim. There, city regulations prohibited construction of structures, including fences, within 40 feet of the shoreline, but authorized variances " . . . provided that the variance conforms to the stated purpose of the Shoreline Regulations." *Id*. at 317. The stated purpose of the regulations was to "prevent structures from going up on the beach" within a specified distance from the shoreline. *Id.* The Idaho Supreme Court held that the plain language of the ordinances left no discretionary authority to the City officials to grant such variance. Therefore, it was not necessary, as in this case, to pursue such variance in order to ripen the taking claim.

Here, the stated purpose of the regulation was to preclude location of major structures seaward of DEP's 30-year erosion projection. The variance cited by the court of appeal was unauthorized because it would have violated statute.

This case is indistinguishable from *City of Coeur D'Alene.*

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had 'settled on a final use.' " Maraist, 47 Fla. L. Rev. at 450. This same commentator further observed that "[t]he possibility of any governmental entity communicating in such a manner to a property owner is remote" and that such judicial pronouncements "effectively signal to the planning agencies methods by which to avoid the finality prong." *Id.*

B. By Ignoring The Trial Court's Dispositive Futility Finding, The Court of Appeal Deprived Beach Group Of Its Constitutional Right To Be Compensated For A Taking.

While this Court generally does not examine state court findings of fact, it does frequently make an independent examination of facts that are intermingled with legal conclusions when necessary to decide whether a person has been deprived by a state court of a right secured by the Constitution. *See Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) (court will review state court findings of fact "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts"); *Cox v. Louisiana*, 379 U.S. 536, 545, n.8 (1965) (in areas involving constitutionally protected rights, "we cannot avoid our responsibilities by permitting ourselves to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding").

The right to be compensated for a regulatory taking is a federal constitutional right. The ripeness of a regulatory taking claim is a federal question of law that is both fact dependent and determinative of the right of access to the courts to vindicate a federal constitutional right. Thus, regulatory taking ripeness cases fall squarely in the category of cases where this Court has found it appropriate to review and analyze the facts below.

Here, the trial court held that even if a variance was available, its pursuit would have been futile "based on the evidence of the history between the parties and the stated views of FDEP [sic]. . . ." (App. 23-24). The trial court's futility finding was supported by competent substantial evidence,[12] and it was dispositive of the ripeness issue in favor of Beach Group. The court of appeal did not pass on the sufficiency of the evidence. Instead, without any analysis or deference to the trial court, it simply substituted its judgment for that of the trial court on the dispositive factual finding of futility. By so doing, it deprived Beach Group of its right to be compensated for what the trial court concluded was a *Penn Central* taking.

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[12] After DEP advised Beach Group that it intended to use the most landward-known survey as its starting point for the 30-year erosion calculation, Beach Group met with DEP staff who indicated that "they were absolutely under no circumstances going to issue us a permit." (App. 7). One of DEP's own engineers "was of the opinion that [a] variance would not be granted." (App. 13, 40). Beach Group's coastal engineer "felt he could do nothing to change the DEP's mind" (App. 8), and that "any variance application would be denied" because of "the no-budge position of the DEP. . . ." (App. 12-13). Beach Group's administrative counsel, a former DEP lawyer, advised Beach Group that a variance from the statute was not available under Florida law. (App. 41, 182-85). And, as previously noted, in 2010, well after DEP issued its final order of denial, the new owner of the property inquired of DEP's CCCL permit administrator as to whether a variance might be available to accommodate Beach Group's original Project. He replied: "[T]he DEP cannot issue permits for major structures except certain single family dwellings located seaward of said line. ***This is state law, which you cannot obtain a variance from***." (App. 10-11) (emphasis added).

Because Beach Group lost the property, it cannot now apply for a variance or reapply for a less ambitious development alternative. Nor can Beach Group likely litigate its federal taking claim in federal court even though it has satisfied *Williamson County*'s state court exhaustion requirement.[13] Thus, not only does the court of appeal's decision effectively nullify this Court's "futility" exception, it ***permanently*** deprives Beach Group of access to the courts to attempt to vindicate its Fifth and Fourteenth Amendment rights to be compensated for a taking.

In the final analysis, ripeness is a prudential, not a jurisdictional, rule.[14] It involves determination of "the fitness of the issues for judicial decision ***and the hardship to the parties of withholding court consideration.***" *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (emphasis added). Its application should include equitable considerations. And where its application is so distorted by a state court as to effectively deprive a landowner of its constitutional rights, this Court should intervene to correct manifest injustice.

[13] *See San Remo Hotel, L.P., et al. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005) (under Full Faith and Credit Clause, issues actually decided in valid state-court judgments may deprive plaintiffs of "right" to have their federal claims relitigated in federal court).

[14] *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702, 729 (2010); *Horne v. U.S. Dept. of Agric.*, 133 S. Ct. 2053, 2062 (2013).

Beach Group subsequently lost the property in separate foreclosure litigation and one of its principals is now saddled with an approximately $10 million personal deficiency judgment. If allowed to stand, the court of appeal's decision forever unjustly denies Beach Group access to the courts to vindicate its right to economically beneficial use of the Property.

CONCLUSION

This Court should grant Beach Group's Petition for Writ of Certiorari to address the miscarriage of justice resulting from the court of appeal's reversal of the trial court's order of taking, and to address the important federal questions of (1) whether landowners must submit and be denied economically impracticable development plans to ripen a regulatory taking claim, and (2) whether regulatory taking ripeness always requires pursuit of a variance, essentially doing away with this Court's futility exception.

Dated: August 14, 2017

Respectfully submitted,

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellant,

v.

BEACH GROUP INVESTMENTS, LLC,
Appellee.

No. 4D14-3307

[August 3, 2016]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Dwight L. Geiger, Judge; L.T. Case No. 2011-CA-000702.

Craig D. Varn, General Counsel, and Jeffrey Brown, Deputy General Counsel, Tallahassee, for appellant.

Philip M. Burlington of Burlington & Rockenbach, P.A., West Palm Beach, and Ethan J. Loeb, David Smolker and Jon P. Tasso of Smolker, Bartlett, Schlosser, Loeb & Hines, P.A., Tampa, for appellee.

MAY, J.

The Department of Environmental Protection ("DEP") appeals an adverse judgment for a regulatory taking. It argues the trial court erred in concluding: (1) the claim was ripe; and (2) the DEP had "taken" the property. We agree with the DEP on the ripeness issue and reverse.

The property consists of approximately 2.2 acres of land in Fort Pierce, which lies between Ocean Drive and the Atlantic Ocean, south of the Fort Pierce Inlet. The inlet is protected by two jetties that extend into the Atlantic Ocean. The jetties and inlet channel cause beach erosion south of the inlet.

Congress authorized beach nourishment south of the inlet, which began in 1971, has continued since then, but will expire in 2021. The beach nourishment has saved the property from erosion. There is no expectation that the inlet or jetties will be removed. It is expected that continued beach nourishment will be needed.

In January 2004, Beach Group Investments, LLC ("Beach Group") purchased the property for $2.4 million. In July 2005, Ocean Breeze Townhomes, LLC ("Ocean Breeze") contracted to purchase the membership interests in Beach Group for $8,718,440. The contract provided that Ocean Breeze would pay approximately $2,155,891 and, as the new owner of Beach Group, issue a promissory note to Beach Group Holdings, LLC for $6,468,440. Beach Group sought to build a high-end seventeen-unit townhome project.

Florida's Beach and Shore Preservation Act mandates the establishment of "coastal construction control lines" ("CCCL"), which "define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions." § 161.053(1)(a), Fla. Stat. Once a CCCL is established, no construction

seaward of it may occur without first obtaining a CCCL permit from the DEP. *See id.* § 161.053(4).

Pursuant to section 161.053(5)(b), the DEP may not issue CCCL permits for a structure in a location that is "based on the [DEP]'s projections of erosion in the area, . . . seaward of the seasonal high-water line within 30 years after the date of application for the permit. The procedures for determining such erosion shall be established by rule." *Id.* § 161.053(5)(b). Pursuant to section 161.053(20), the "[DEP] may adopt rules related to the establishment of [CCCLs]; activities seaward of the [CCCL]; exemptions; property owner agreements; delegation of the program; permitting programs; and violations and penalties." *Id.* § 161.053(20).

Rule 62B-33.024 of the Florida Administrative Code ("FAC") sets forth the DEP's current "Thirty-Year Erosion Projection Procedures."

> A 30-year erosion projection is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-year erosion projection of the seasonal high water line (SHWL) shall be made by the [DEP] on a site specific basis upon receipt of an application with the required topographic survey, pursuant to Rules 62B-33.008 and 62B-33.0081, F.A.C., for any activity affected by the requirements of Section 161.053(5), F.S.

Fla. Admin. Code R. 62B-33.024(1).

Subsection (2)(d) regulates "[b]each nourishment or restoration projects." *Id.* § 62B-33.024(2)(d). Under that section, "The [Mean High Water Line] MHWL to SHWL[1] distance landward of the erosion control line (ECL) shall be determined. If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL." *Id.* § 62B-33.024(2)(d)3. The ECL is "the line . . . which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean." § 161.151(3), Fla. Stat.

Because the project was seaward of the CCCL, Beach Group had to obtain a permit. To get the permit, the project had to be on the landward side of the thirty-year erosion projection line. The thirty-year erosion projection line is calculated using a five-step process. The ECL, MHWL, SHWL, and the erosion projection rate are all used in the calculation.[2] Under step one, it is necessary to locate the pre-nourishment project MHWL.

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[1] The SHWL is "the line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above local mean high water." § 161.053 (5) (a) 2., Fla. Stat.

[2] Different lines are involved in the calculation: (1) Erosion Control Line ("ECL"); (2) Mean High Water Line ("MHWL"); (3) Seasonal High Water Line ("SHWL"); (4) line of continuous construction; (5) Coastal Construction Control Line ("CCCL"); and (6) thirty-year erosion projection line.

When the original Beach Group bought the property in January 2004, the thirty-year erosion projection calculation rule set the MHWL, the starting point, at the ECL. However, the DEP amended its thirty-year erosion projection rule in June 2004 (before Ocean Breeze purchased the membership interest in Beach Group). The new rule provided: "If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL."

This amendment resulted in a change of the location of the MHWL step-one starting point. The further landward the starting point, the further landward the thirty-year erosion projection line, which left less land available for development. The rule change resulted in the DEP's denial of Beach Group's CCCL permit because the project was seaward of the thirty-year erosion projection line. Beach Group's position was that under the previous step-one calculation method (using a 1997 ECL), which it believed the DEP used beyond the rule amendment date, the project would have been landward of the thirty-year erosion projection line and its CCCL permit would have been approved.

Beach Group's Application Process

Prior to closing on the 2005 property purchase contract, Ocean Breeze (now Beach Group) met with "numerous professionals," including a land planner, civil engineer, and architect. Ocean Breeze reviewed its site

plan with the city commissioners, each of whom expressed enthusiasm.

Ocean Breeze hired Michael Walther ("Walther") of Coastal Technologies ("Coastal Tech") to evaluate the likelihood of obtaining a CCCL permit for the property. If the proposed project was seaward of the thirty-year erosion projection line, the DEP would not issue a CCCL permit. Walther relied on the 1997 ECL as the step-one starting point and opined that it was the DEP's practice to use it.

Prior to the July 2005 property acquisition, Coastal Tech informally provided an analysis to the DEP, requesting its approval. Coastal Tech staff emailed Harold Seltzer, a member of Beach Group ("Beach Group Seltzer"), and told him they spoke with the DEP, which said "the line of continuous construction looks good, our structure is landward of that line." According to Walther, there was no need for a more formal pre-application conference with the DEP prior to submitting the application because the DEP had been using the 1997 ECL as the starting point in calculating the thirty-year erosion projection line.

After closing in July 2005, Beach Group submitted its plans and applications for a driveway access permit and environmental resource permit to the City of Fort Pierce, which approved them. In December 2005, Beach Group submitted a formal CCCL permit application to the DEP.

In February 2006, the Coastal High Hazard Study Committee issued its final report ("Report"), recommending that the DEP strengthen setback requirements for the CCCL permit program. It recognized that "[s]trengthening the setbacks within the CCCL permitting program may result in economic impacts, both by restricting a property owners' ability to construct on a parcel and to the State through potential increased takings claims."

In April 2006, DEP engineer Emmett Foster ("Foster") concluded that Beach Group's application was a "certain denial." In June 2006, the DEP explained to Beach Group that its major structures might be seaward of the thirty-year erosion projection line. It suggested that Beach Group redesign the project to be landward.

In August 2006, the DEP provided Beach Group with its analysis, which recommended using a 2002 survey's MHWL (the most landward-known survey line) in its thirty-year erosion projection calculation. Beach Group Seltzer testified that at a September 2006 meeting, the DEP "politely listened to what [Walther] had to say and then very quickly made it clear that they disagreed with [his] analysis entirely and that they had no intention to issue the permit, that they were going to deny the permit." According to Beach Group Seltzer: "[m]y understanding was that the variance would have been submitted and decided upon by the very people who had just finished telling us in four-part harmony that they were absolutely under no circumstances going to issue us a permit."

Walther felt he could do nothing else to change the DEP's mind.

Coastal Tech's report noted, "the D[EP] will not 're-visit' its analysis of the 30-year SHWL." It also noted that for the DEP to approve the project as currently planned, applicants would have to "submit a variance request that is subsequently approved by the D[EP] (Note: A variance request may or may not be approved by the D[EP])." But, Walther did not believe the DEP would adopt a variance based on a conversation he had with the DEP staff.

In November 2006, the DEP notified Beach Group that its CCCL permit application was denied based on its determination that the project was seaward of its thirty-year erosion projection line. The DEP also found the project was not designed to minimize adverse impacts to the dune system. Beach Group petitioned for an administrative hearing.

An administrative law judge ("ALJ") conducted a hearing, and in April 2007, issued an order recommending denial of Beach Group's CCCL permit application because the "[p]roject extends seaward of the 30-year erosion projection." The ALJ performed the five-step analysis under Rule 62B-33.024. The ALJ rejected Walther's and Foster's recommendations[3] for the pre-nourishment MHWL, finding the starting point

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[3] Walther recommended using the 1997 ECL and the [sic] Foster recommended using the 2002 MHWL survey because he did not consider the 1997 ECL to be an appropriate pre-project ECL.

should be the line depicted in a 1968 pre-project survey. This was because the project included beach nourishment efforts that started in 1971 and continued through the present. The thirty-year erosion projection line was much closer to Foster's projection than Walther's.

The ALJ also recommended:

> The likelihood of continued beach nourishment south of the inlet for the foreseeable future might be appropriate for consideration in the context of a request for a variance or waiver under Section 120.542, Florida Statutes. . . . A variance or waiver must be pursued through a separate proceeding.

The DEP entered a Final Order adopting the ALJ's recommended thirty-year erosion projection line and denying Beach Group's CCCL permit application. The DEP adopted and incorporated the ALJ's Recommended Order subject to the DEP's ruling on exceptions. It also noted: "This denial should not be construed as a statement of denial of any development potential for the subject parcel. The D[EP] is denying the specific proposal based upon the information submitted by the applicant and evidence presented at hearing." The order also included the ALJ's recommendation for Beach Group to pursue a variance.

In 2010, Beach Group lost the property to its lender in separate litigation, and a personal judgment was entered against Beach Group Seltzer, who guaranteed the loan. In March 2011, Beach Group filed a

complaint against the DEP for an as-applied regulatory taking. It alleged that it purchased the property in May 2005 "with the intention of developing it consistent with City land use and zoning regulations with luxury, oceanfront townhomes and to sell the townhomes."

The DEP moved to dismiss the complaint for lack of ripeness, which the trial court denied. The DEP answered and asserted affirmative defenses, including that the claim was not ripe because there may be other permissible uses of the property, and Beach Group failed to apply for a waiver or variance. It moved for summary judgment on ripeness, which the court denied. The case proceeded to a non-jury trial.

Tony McNeal, the DEP's program administrator for the CCCL permit program ("DEP Administrator McNeal"), testified that the DEP believed Beach Group's project failed to meet the requirements of the statute and rules. He suggested that the DEP could have granted a variance from its rule addressing calculation of the erosion projection. "A variance is not available from the statute, but it is from the rule, and again, the announcement is consistent with the rule, so they could have got a variance from the rule and made it consistent with the statute."

DEP Administrator McNeal was questioned on a series of emails between him and the new property owner in 2010. The new property owner asked if there was "[a]ny opportunity for [a] variance to accommodate prior plan of 2004," to which DEP Administrator

McNeal responded: "As stated in my e-mail below 'the DEP cannot issue permits for major structures except certain single-family dwellings located seaward of said line.' This is state law, which you cannot obtain a variance from."

Per a 1999 memo, the DEP indicated that the 1997 ECL was the starting point for the thirty-year erosion projection line. An internal DEP memo from August 2004 (after the rule amendment) commented that another CCCL permit application met the requirements for approval and used the 1997 ECL as the starting point for its thirty-year erosion projection line.

A May 4, 2006, survey review conducted by a DEP official noted that "The Erosion Control Line (ECL) as recorded in Plat Book 37 Page 2 of the public records of St. Lucie County is the controlling and most current line." In a July 2006 email, John Poppell, a DEP staff member, notified Coastal Tech that he agreed with MHWL and SHWL values, and relied upon the 1997 ECL.

Following the non-jury trial, the court entered an order finding the DEP had taken the property ("Taking Order"). The court noted that Beach Group was alleging an as-applied regulatory taking under *Penn Central*.[4] It found the "preponderance of the evidence supports a regulatory as-applied taking . . . under *Penn Central*."

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[4] *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978).

It also found "Beach Group had a distinct and reasonable expectation in the development, use and sale at a profit of a seventeen-unit townhouse condominium project, based on . . . the [DEP's] published policies and historical practices." The DEP's regulatory policy change caused Beach Group to lose this expectation, and to suffer "substantial deprivation of the economic use of its Property."[5] Beach Group had submitted a meaningful permit application, which was denied. CCCL permits were dictated by statute, not rule, and any request for a variance would have been futile.

In its incorporated findings, the court explained: "Factually, the June 1, '06 Foster memo really is a bright line change of opinion and policy by [the DEP] that would stop permit permitting at a line that had been used prior and then would dictate permitting approval only to a more landward line and would result, in this case, to denial of this permit application." It continued:

> At [the September 2006] meeting, it was very obvious there was not going to be an approval of the permit as requested. [DEP Administrator] McNeal suggested a variance. . . . Walther recommended not to pursue a variance. He was of the opinion that any variance application would be denied because of what he terms

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[5] Beach Group provided expert testimony that the rule change reduced the project's profitability by 96% if a smaller project was built. Based on a six-unit condominium complex, the loss of profitability would have been 90%, which did not include the cost of land acquisition. The property had some value, but smaller developments would cause a loss.

> the no-budge position of the D[EP], that the Foster analysis was correct and accurately stated the policy of DEP. Mr. McDowell also had suggested to redesign the project. And another [DEP] engineer, Gene Chalecki, was of the opinion that variance would not be granted. Based upon this, no application for a variance was ever made.

The matter proceeded to a jury trial on damages. From the final judgment, the DEP now appeals.

The DEP makes two arguments as to why Beach Group's takings claim is not ripe. First, it argues Beach Group failed to request a variance; and second, Beach Group failed to pursue other reasonable avenues to develop the property. Beach Group responds that its application was not "too grandiose," and all of its applications other than the CCCL permit were approved. Its application was meaningful and the DEP denied it with finality. The DEP was not authorized to grant a variance from statutory requirements.

The DEP replies that proposed agency action does not prevent an agency from changing its mind. Its Final Order included language suggesting a variance petition was open for consideration. Beach Group could have moved the thirty-year erosion projection line seaward by showing that existing beach restoration projects would continue for a sufficient length of time.

We have de novo review of legal conclusions on ripeness. *Alachua Land Inv'rs, LLC v. City of Gainesville*, 107 So. 3d 1154, 1159 (Fla. 1st DCA 2013).

Ripeness is the threshold question in an as-applied regulatory takings claim. *Id.* at 1158. It requires the property owner to take "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering the development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001).

Unless the permitting authority has already reached a decision on the pursuit of a variance or such a pursuit is futile, the owner is required to pursue administrative remedies to obtain a variance. *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1181 (Fla. 4th DCA 1995). Contrary to the conclusions in the Taking Order, a property owner cannot always claim that one "meaningful application," in and of itself, is enough to ripen a claim. *Alachua Land Inv'rs, LLC*, 107 So. 3d at 1163.

Where a variance is a reasonably possible means of allowing additional flexibility in the agency's permit decision, the owner must apply not only for a permit but also a variance. *See McKee v. City of Tallahassee*, 664 So. 2d 333 (Fla. 1st DCA 1995). Here, Beach Group admittedly did not apply for a variance. Had it done so, it could have argued that the 1997 ECL should have been applied or that continued beach restoration would prevent the erosion anticipated by the DEP.

The trial court erred in interpreting the governing statute. Section 120.542, Florida Statutes, makes a distinction between "variances . . . to statutes," which are

prohibited, and "variances and waivers to requirements of [agency] rules," which are permitted. § 120.542(1), Fla. Stat. The trial court concluded that because the requirement to obtain a CCCL permit is statutory, the DEP could not have issued a variance. This conclusion would be correct if the question was whether the DEP could grant a variance from the requirement to obtain a permit. But, that was not the question. The DEP had the authority to issue a variance as a matter of law because it involved a site-specific exception to its usual methods of calculating the thirty-year erosion projection line. § 161.053(5)(b), (20), Fla. Stat.

Consistent with the plain language of the statute, the *methods* of determining the thirty-year erosion projection line are established by the DEP through rule adoption. § 161.053(5)(b), Fla. Stat. The DEP's erosion projection rule sets a rigid formula for calculating the expected duration of a beach restoration project. The DEP had authority to grant a variance from the requirements of that rule.

As explained in footnote 13 to the ALJ's Recommended Order:

> The likelihood of continued beach nourishment south of the inlet for the foreseeable future might be appropriate for consideration in the context of a request for a variance or waiver under Section 120.542, Florida Statutes. See Pet. Ex. 21 (identifying a variance as a possible means for the Project to be approved as it is currently proposed). A variance

> or waiver must be pursued through a separate proceeding.

The DEP incorporated that finding in its Final Order as the final word on its position regarding a variance.

The Final Order is final agency action. By incorporating the ALJ's separate Recommended Order, the DEP invited a variance application and even went so far as suggesting a justification for one. Given the undisputed content of the final agency action, a variance application would not have been futile. *Alachua Land Inv'rs, LLC*, 107 So. 3d at 1163 (finding case was not ripe where the municipality expressed an interest in working with the applicant); *see Shillingburg*, 659 So. 2d at 1181; *Tinnerman v. Palm Beach Cty.*, 641 So. 2d 523, 526 (Fla. 4th DCA 1994).

Here, the DEP issued a Final Order incorporating the ALJ's written conclusions, including his observation that the likelihood of continued nourishment projects "might be appropriate for consideration" if Beach Group applied for a variance. Simply put, the DEP provided Beach Group with the opportunity to apply for a variance. But, Beach Group did not seize that opportunity, depriving the DEP from exercising its authority to grant a variance.

The case was not ripe for a second reason: Beach Group did not propose an alternative development plan. Its planner testified that based on the location of the DEP's erosion projection, it still would have been possible to develop a project on the property with six to ten units, with similar units sizes as the proposed

Allegria project (albeit with differing amenities), and up to fifteen smaller units with fewer amenities. And, Beach Group's former attorney suggested a single-family residence as an alternate development on the property.

The record reflects that Beach Group could have considered alternative plans for the property. "[T]he mere fact that the denial of a permit deprives a property owner of a particular use the owner deems most profitable or preferable does not demonstrate a taking." *Alachua Land Inv'rs, LLC*, 107 So. 3d at 1159; *see MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 353 n.9 (1986); *Leto v. State of Fla. Dep't of Envtl. Prot.*, 824 So. 2d 283, 285 (Fla. 4th DCA 2002).

The purpose of the ripeness requirement is to reach certainty regarding the nature and magnitude of restrictions that a permitting agency has imposed on the property owner. There is no dispute that Beach Group did not apply for an available variance. There is no dispute that Beach Group did not pursue an alternative project.

We do not address the secondary "taking" issue as it is unnecessary to our holding. We reverse and remand the case for proceedings consistent with this opinion.

Reversed and Remanded for further proceedings consistent with this opinion.

WARNER and CONNER, JJ., concur.

*   *   *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

October 18, 2016

		CASE NO.: 4D14-3307 L.T. No.: 2011-CA-000702
STATE OF FLA. DEPT. OF ENVIRONMENTAL PROTECTION	v.	BEACH GROUP INVESTMENTS, LLC.
Appellant/ Petitioner(s)		Appellee/ Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the appellee's September 7, 2016 motion for rehearing is denied.

Served:

cc:

Philip M. Burlington	Jonathan A. Glogau	Jeffrey Brown
		Christina D. Dodds
Ethan Loeb	Daniel W. Bishop	Jon P. Tasso
Matthew Zane Leopold	David Smolker	

/s/ Lonn Weissblum [SEAL]
LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA CIVIL DIVISION

BEACH GROUP INVESTMENT, LLC,
Plaintiff

vs.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant. /

CASE NO.: 2011-CA-000702
JUDGE DWIGHT GEIGER

ORDER

(Filed Nov. 14, 2013)

THIS CAUSE came before the Court for a non-jury trial on April 23-26, 2013 on the issue of liability under Plaintiff Beach Group Investment, LLC's ("Beach Group" or "Plaintiff") claim for inverse condemnation (Count II) and defenses related thereto. Having carefully reviewed and considered the documentary evidence presented at trial, given due consideration to the weight and credibility of the various witnesses offered by both sides, heard and considered the arguments of counsel and the briefs submitted by all parties, and being otherwise fully advised, this Court FINDS that the Plaintiff has prevailed on its claim for inverse condemnation under Count II, and further FINDS and CONCLUDES as follows:

BACKGROUND AND FACTUAL FINDINGS

All parties of interest have been properly served with process or have otherwise submitted themselves to the Court's jurisdiction, and the Court has jurisdiction over the parties and the subject matter of this cause. The parties are before the Court on Beach Group's claim for inverse condemnation under Article X, Section 6 of the Florida Constitution, alleging an as-applied regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), as adopted by Florida courts.[1]

This is the first part of a bifurcated trial. At this stage the Court has been asked to determine whether Defendant Florida Department of Environmental Protection ("FDEP") is liable to Beach Group for an as-applied regulatory taking.

The property at issue in this case is located at 222 South Ocean Drive (the "Property"), located on Hutchinson Island within the City of Fort Pierce, St. Lucie County. The Property consists of 2.16 acres of land that fronts South Ocean Drive. The Property is more particularly described as:

> Beginning at the Southwest corner of Block 2 of Fort Pierce Beach Subdivision, as recorded in Plat Book 8, at page 29 of the Public Records of St. Lucie County, Florida; thence run N19°02'03"W, along the Westerly line of said Block 2, a distance of 346.28 feet; thence run N82°01'3"E, a distance of 139.84 feet, thence

[1] Prior to trial Beach Group dismissed Count I voluntarily.

> run N07°58'47"W a distance of 18.50 feet; thence run N82°01'13"E, a distance of 121.85; thence run N07°58'47"W a distance of 55.50 feet; thence N82°01'13"E, a distance of 71.42 feet, to the South Beach High Tide Line as recorded in Plat Book 14, Page 48 of the Public Records of St. Lucie County, Florida; thence run S01°42'10"W, along said South Beach High Tide Line, a distance of 411.72 feet to the Southerly line of said Block 2, thence run S79°41'57"W along the said Southerly line of Block 2; a distance of 197.64 feet to the POINT OF BEGINNING; all lying and being in Section 36, Township 34 South, Range 40 East and Section 1, Township 35 South, Range 40 East, St. Lucie County, Florida.

The Court expressly incorporates herein the findings of fact set out in the transcript at pp. 6-25, attached hereto as Exhibit "A," and specifically makes those factual findings a part of this Order.

CONCLUSIONS OF LAW

The preponderance of the evidence supports a regulatory as-applied taking in this case under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 871 n.12 (Fla. 2001) (recognizing *Penn Central* claims); *Golf Club Plantation, Inc. v. City of Plantation*, 717 So. 2d 166, 171 (Fla. 4th DCA 1998); *State of Florida v. Basford*, 119 So. 3d 478, 481-82 (Fla. 1st DCA 2013).

The FDEP was legally authorized to refuse to issue the Coastal Construction Control Line permit requested by Beach Group. However, at the time of its 2005 investment in the Property, Beach Group had a distinct and reasonable expectation in the development, use and sale at a profit of a seventeen-unit townhouse condominium project, based on, among other things, the FDEP's published policies and historical practices. The subsequent regulatory policy change by the FDEP caused Beach Group to lose its distinct investment-backed expectations in the Property.

An analysis of the economic impact of the regulatory change in this case demonstrates that, as a result of the permit denial, Beach Group suffered substantial deprivation of the economic use of its Property. The evidence further establishes that as a result of the deprivation, Beach Group suffered serious economic harm, including loss of the initial land investment, loss of the opportunity to make a reasonable rate of return, and loss of out-of-pocket costs and development expenditures.

With regard to the character of the government action, FDEP was within its statutory authority to protect the beaches and coastal barrier dunes when it changed its policy and denied the permit.

The FDEP raised the defense of ripeness at trial, arguing that Beach Group's claim is not yet ripe because Beach Group did not submit an application for a variance after the permit was denied. Beach Group, however, submitted a meaningful permit application.

See Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561, 573 (Fla. 4th DCA 2002) (one "meaningful" application required for ripeness). Additionally, the requirement for a Coastal Construction Control Line permit is dictated by statute, and not by rule. *See* Fla. Stat. §§ 120.542 and 161.053. The Court finds, moreover, that, based on the evidence of the history between the parties and the stated views of the FDEP, it would have been futile for Beach Group to have separately applied for a variance. *See Taylor v. Riviera Beach*, 801 So. 2d 259, 263 (Fla. 4th DCA 2001).

The FDEP also implied at trial that Mr. Walther was somehow liable for Beach Group's damages rather than the FDEP, and that Mr. Walther had committed malpractice. The Court rejects this purported defense for lack of factual support.

NOW THEREFORE, THE COURT FURTHER FINDS, ORDERS AND ADJUDGES:

A. On the issue of liability, the court finds for Plaintiff Beach Group and against Defendant Florida Department of Environmental Protection on the claim for inverse condemnation in Count II.

B. The Property is hereby declared to have been taken by Defendant as of August 10, 2007.

C. The Court reserves ruling on all issues relating to damages. The case will be set for a jury trial on the issue of compensation, which trial will be noticed separately. All objections concerning what are compensable damages are reserved and will be taken as

evidentiary matters and as jury instruction matters at the time of the jury trial.

D. The Court retains jurisdiction to determine and award full compensation for the taking of the Property, including on issues of attorneys' fees and costs. The Court further reserves jurisdiction to enter such supplemental orders as may be necessary to implement this Order.

DONE and **ORDERED** in Ft. Pierce, St. Lucie County, Florida on this _____ day of November, 2013.

/s/ Dwight L. Geiger
Dwight L. Geiger
CIRCUIT COURT JUDGE

Copies furnished to:

Ethan J. Loeb, Esquire
David Smolker, Esquire
Jon P. Tasso, Esquire
Dan Bishop, Esquire
Christina Carlson Dodds, Esquire
Jon Glogau, Esquire
Lisa Raleigh, Esquire
J.A. Spejenkowski, Esquire
W. Douglas Beason, Esquire
West Gregory, Esquire

EXHIBIT A

HEARING October 16, 2013
BEACH GROUP vs.
STATE OF FLORIDA 1-4

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY,
STATE OF FLORIDA

CASE NO.: 2011-CA-000702

BEACH GROUP INVESTMENTS, LLC,)
Plaintiff(s))
vs.)
STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,)
Defendant(s).)

THIS CAUSE came on for hearing before the Honorable Dwight Geiger, Judge of the above court at the ST. LUCIE County Courthouse, Fort Pierce, Florida, beginning at the hour of 3:01 p.m., on the 16th day of October, 2013.

THE APPEARANCES were as follows:

FOR PLAINTIFF:
SMOLKER, BARTLETT, SCHLOSSER
LOEB & HINDS, P.A.
500 E. Kennedy Boulevard, #200
Tampa, Florida 33602
BY: Ethan Loeb, Esquire
David Smolker, Esquire

FOR PLAINTIFF:
BISHOP LONDON & DODDS
3701 Bee Cave Road, #200
Austin, Texas 78746
BY: Dan Bishop, Esquire
Christina Carlson Dodds, Esquire

FOR DEFENDANT:
OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
BY: Jon Glogau, Esquire
Lisa Raleigh, Esquire
J.A. Spejinkowski, Esquire
N. West Gregory, Esquire
W. Douglas Beason, Esquire

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[3] PROCEEDINGS

THE COURT: Good afternoon.

MR. LOEB: Good afternoon.

THE COURT: Let me, so I know who all is here, since you all were appearing by Court Call, also so the reporter can take down, let's see, Mr. Loeb?

MR. LOEB: Yes, sir. How are you doing?

THE COURT: Good afternoon, sir. You represent the Plaintiff.

Mr. Bishop, are you with us?

MR. BISHOP: I'm on, as well, your Honor. Thank you.

THE COURT: Good afternoon, sir.

Mr. Smolker?

MR. SMOLKER: Yes, sir, I'm on. Good afternoon.

THE COURT: Good afternoon.

Mr. Tasso, are you –

MR. LOEB: He is not here with us today, Judge.

THE COURT: Okay. Then for the – Are there any other appearances to be made on behalf of Plaintiff?

MS. DODDS: Judge, this is Christina Dodds. I'm Mr. Bishop's partner. I'm also on.

[4] THE COURT: Okay, good. Thank you. Welcome.

MS. DODDS: Thank you.

THE COURT: You're welcome.

Let's see, for the Florida Department of Transportation – or Department of Environmental Protection, excuse me, Mr. Glogau?

MR. GLOGAU: I'm here, your Honor.

THE COURT: And Mr. Raleigh?

MS. RALEIGH: Here, sir.

MR. GLOGAU: Miss Raleigh.

THE COURT: Miss Raleigh. Excuse me. Mr. Spejenkowski; is that right, sir?

MR. SPEJENKOWSKI: Yes, sir.

THE COURT: You're here.

Any other appearances on behalf of Florida Department of Environmental Protection?

MR. GLOGAU: Your Honor, I have two lawyers from the Department here as client representatives.

MR. GREGORY: Hi, I'm West Gregory.

MR. BEASON: And my name's Douglas Beason. I may have actually made an appearance long ago in this case.

THE COURT: Who introduced the last two lawyers, that was Mr. Glogau?

[5] MR. GLOGAU: Yes.

THE COURT: Okay, thank you. I'm going to then, at this time, take a little bit more than just a few minutes to read into the record the facts, as I find them from the evidence. And you can probably guess, by the extended length of time it's taken me to get ready, that the factual determinations were a lot more difficult and time-consuming than what I had envisioned. I apologize for taking so much time, but it has taken me a long time to get ready.

Based upon the evidence, which is quite a few tangible exhibits and several days of testimony, I do make certain findings of fact; and after that then I'm going to make some conclusions of law. But before I start the conclusions of law, I will ask to have an Order, based upon this pronouncement, made in writing. When I get to that point, I don't know that it's necessary to try to recite all the facts that I'm going to read into the record in an Order. I'm taking the time to read them into the record, so that if there's any question about what the facts are that I found, that can be transcribed. Unless one of you all wants all the facts recited in the Order, the written Order, I'm not going to require that, because I just don't think that's necessary, but we'll get

to that, [6] as far as the form of the Order, a little bit later then.

The facts that I find them then from the evidence are as follows: This is a cause of action that has been brought for adverse or – excuse me – inverse condemnation under the Florida Constitution, which is Section 6 of Article X. The subject real property of this action lays approximately south of the Fort Pierce Inlet in St. Lucie County, Florida. The inlet itself was first constructed from its natural state in approximately 1920 to 1921, using dredging and jetties on the northerly and southerly sides of the natural inlet. A consequence, and I believe it's a natural consequence, of the inlet's construction has been interruption of the longshore sand transport and, therefore, a buildup of sand on the north side of the constructed inlet and erosion on the south side of the inlet; and this is for some 12,000 feet south of the inlet, which is approximately 2.27 miles.

On May 30th of the year 1997 a Joint Inlet Management Plan was adopted by St. Lucie County and the Florida Department of Environmental Protection to restore or renourish that same distance, that is the 2.3 miles of the beach south of the inlet, in part, by [7] placing products from continuing dredging of the natural inlet and this is also along with other materials on what's termed a downdraft of the beaches.

The renourishment has saved areas east of what has been termed the CCL, including part of the subject property and State Road A1A, from erosion which would have destroyed the property, including probably

the road; and that renourishment project continues today.

On January 31st of the year 2001 the Florida Department of Environmental Protection adopted or – excuse me – approved a duplex construction project in this area and that particular permit was landward of the existing line, which loosely is the 30-year

Erosion Protection Line. A similar permit had been issued December 14th of the year 2000.

The engineer, who appears to be the primary engineer for Florida Department of Environmental Protection in this area, Emmett Smith (sic) noted on April 9th of the year 1999 that the federal beach renourishment project south of the inlet was authorized and expected to continue until 2021; and, at that time, Mr. Foster recommended giving a credit for renourishment for 22 years to those two projects. Mr. Foster also noted that the 30-year erosion [8] projection is estimated to be landward of the – at that time of what was termed the Erosion Control Line.

The names given to various lines are important only that the various lines that have been established are tending to show what is the 30-year erosion line. The Coastal Continuous Control Line that I mentioned earlier, the CCL, has been used administratively by the Florida Department of Environmental Protection as the impact line for a hundred-year storm; and traditionally anything seaward of that line does require a special permit for construction.

The Florida Department of Environmental Protection also approved applications in 2004 for a project and this was essentially based upon the line of continuous construction. That's a duplex project. At that time when that project, the '04 project was approved, there was a shoreline rate of change of some 3.3 feet per year that was noted by Florida Department of Environmental Protection, this for a 22-year period from 1972 to 1994; noting also that the beach renourishment project was continuing.

After these historical events that occurred, Harold Seltzer, who is CEO of the Plaintiff Beach Group, in the spring of 2005 began the purchase [9] process of the subject 2.25 – approximately 2.25 acres of beachfront property, approximately 412 feet of beachfront. This included a due diligence research on permitting and planning for a three-floor townhouse condominium project, which would include garages below the townhouses. He envisioned 17 units of very upscale housing. The due diligence inquiry included more specifically private meetings with each of the City of Fort Pierce Commissioners and engaging a Coastal Engineer, Michael Walther; meeting with brokers and developers to determine the rental value and sales projections for the project that he envisioned.

Mr. Walther did preliminary work and opined on July 10th of the year 2005 that the 17-unit project envisioned by Mr. Seltzer would be approved and it could be built. Thereafter, Beach Group did actually purchase the parcel for approximately $8.7 million, which is approximately $9 per square foot for the 2.2 acres.

This was after he had obtained an appraisal by Mercantile Bank that appraised the subject property at $8.8 million and thus justified the purchase price that he paid. A purchase money note and mortgage, based on that appraisal, were given for $6.5 million. Plus additional cash was paid then [10] for the property. When I say that, the property was bought by buying the Beach Group itself, the corporation.

Part of the due diligence and opinion by Mr. Walther included work by a permit specialist Regina Burdock that endeavored to confirm what I noted before the line of continuous construction for the proposed 170[sic]-unit townhome project; and she talked with Mr. John McDowell at Florida Department of Environmental Protection. And, after that, she did confirm to Mr. Seltzer that Mr. McDowell indicated that the line of continuous construction would most likely be approved as the seaward construction line for this proposed project and would be consistent with the 30-year erosion projection, so this would be an approvable project. I note that as part of the justification for Mr. Seltzer going ahead with the purchase.

After the purchase, Mr. Seltzer did obtain site plan approval from City of Fort Pierce on September 6th of the year 2005. The City provided its Letter of Local Approval to Mr. McDowell, of the Florida Department of Environmental Protection, on September 30 of the year 2005 for the 17-unit townhome project. A Florida Department of Transportation [11] permit was obtained March 6th – excuse me – March 11th of the year

2006 and a Florida Department of Environmental Protection Environmental Resource Permit was obtained December 11th of the year 2006. And by May of the year 2006, Mr. Seltzer had spent some additional $600,000 in planning process, plus out-of-pocket land cost – plus the initial out-of-pocket land cost and then also the land carrying cost. Also, by that time he had three preconstruction purchase commitments from various people for the planned townhome community. Mr. Seltzer knew, at that point, that the only way that he could build and sell out the project at a profit was to obtain the permit for the 17 units that he had planned and presented to Mr. Walther.

Mr. Walther is a coastal engineer, as he evaluated oceanfront development projects since 1981 and established a business known as Coastal Tech in 1984. He has developed some two hundred to three hundred oceanfront construction projects. He then went ahead and completed the engineering portion of the permit for the DEP to construct the 17 units and all the other portions of the project. He reviewed what he believed the DEP's approvable seaward limit of construction would be, based upon the 30-year erosion [12] projection and the continuous line of construction of adjacent structures. He never knew of a permit approval policy change from that used prior to the submission of the current application for a permit, that is that there was a change in the 30-year erosion projection.

The permit itself, the application for a Coastal Construction Control Line permit was sent to the DEP December 16th of the year 2005. It actually was routed

from Beach Group through Coastal Tech, sought the construction that was the 17 units at the subject site. Later on there were some requests for additional information. Mr. Walther's company did provide information as requested by the DEP on at least two occasions: February 7th of the year 2006 and April 20th of the year 2006. Regina Burdock provided additional information requested by Mr. McDowell, this to supplement the application which had been sent up in December.

While this was going on, the Florida Coastal High Hazard Study Committee was meeting and preparing its final report, which was dated February 1st of the year 2006; and this was because of unusual damage by the hurricanes of 2004 and 2005 in the area. Part of the input, if you will, to the High Hazard Study [13] Committee came from the Florida Department of Environmental Protection. The significant portion of the report deals with what the Committee terms a lack of setbacks within the Coastal Construction Regulatory program and states specifically the strength of the setback or coastal construction control laws depends on the setback distance and the exceptions allowed. Then it further cites the CCL program and says "under the CCL program, major development seaward of a predicted 30-year erosion project is prohibited" and then cites statutory law, Florida Statute 161.053.

The report further notes that some statutory exemptions do exist. However, none of those appear to apply or would apply to this current project. The report further states that strengthening the setbacks within

the CCL permitting program may result in economic impacts both by restricting a property owner's ability to construct on a parcel and to the State through potential increase taking claims. The report recommends that by May 1 of the year 2006 that the Department should begin reevaluating setbacks within the CCCL regulatory program and reevaluate the 30-year erosion projection.

On April 25th of the year 2006, Mr. Emmett Smith (sic), who is the FSU beaches and shore resource [14] center engineer, sent an e-mail to Mr. McDowell, at Florida Department of Environmental Protection, that based upon his early review of the Beach Group project application, that it was, in his words, a certain denial since it was in Fort Pierce, and noted where it was in relation to the inlet.

On May 4th of that year, Mr. Popple, a surveyor, corresponded by e-mail with Mr. McDowell concerning application of the Erosion Control Line. On May 8th of that year – excuse me – May 8th of that year, Mr. Popple also corresponded again concerning application of the Erosion Control Line. Mr. Foster then directly questioned whether the projection used by Mr. Walther was the correct projection for the approvable line of construction for this project.

A meeting was had at the Department of Environmental Protection office in Tallahassee. One of the attendees later was a witness at trial, Mr. Tony McNeal, Engineer with Department of Environmental Protection. The Foster projection, suffice it to say, differed

significantly from the projection by Mr. Walther as to where the permitted line of construction would be. And, on June 1st of the year 2006, Mr. Foster made a memorandum which [15] recommended a policy change, which ultimately became Florida Department of Environmental Protection policy that moved the 30-year Erosion Projection Line landward.

His memo notes that sand-filled projects south of the inlet are expected to continue until funding is discontinued or sand resources are exhausted and that the current federal nourishment project is authorized through the year 2020, certainly implying a question as to how long the nourishment could or would continue. He did also note that all or a large portion of every property in the subject area, which would be this area immediately south of the inlet, would be, in his words, within the 30-year erosion projection that he was recommending.

Mr. Foster, in making these recommendations, did endeavor to interpret and follow a rule change that had been in effect since 2004. However, there had been not any interpretation of the rule that would have this effect on the line of erosion.

Factually, the June 1, '06 Foster memo really is a bright line change of opinion and policy by Florida Department of Environmental Protection that would stop permit permitting at a line that had been used prior and then would dictate permitting approval [16] only to a more landward line and would result, in this case, to denial of this permit application.

The line of continuous construction that exists in the area has existed since approximately 1997 when a 30-year Erosion Projection Line was established.

On June 5, shortly thereafter, 2006 Mr. McDowell responded to Beach Group that the Environmental Protection's preliminary assessment was that major structures may be located seaward of the estimated erosion projection and, therefore, recommends redesign to landward of the 30-year erosion projection. On August 10 of the year 2006 there was a meeting by telephone between representatives of Florida Department of Environmental Protection and Coastal Tech. And although the preliminary response had been issued on June 5 of the year 2006, there still had not been a definitive statement of where the 30-year seasonal high water line was and also exactly where the erosion line was. The subject regulation, which, if I've written it down correctly here, is FAC 62b-33.0241, does require that the line for construction be determined on a site specific basis.

A report of the August 10 meeting was circulated. It indicated that there was a [17] disagreement between Mr. Smith and the surveyor, Mr. Popple, as to what was the erosion projection and also noted the site specific basis for determining a permit application.

August 29th a memo was issued from Mr. Foster to Mr. Walther that clarified the 30-year erosion estimate; and, at that time, Mr. Foster recommended that the 30-year projection for erosion would be a seasonal high water line. Thereafter, Mr. Foster's recommendations –

these essentially are contained either in his June memorandum to the file or in his correspondence with or to Beach Group – were adopted as policy by Florida Department of Environmental Protection.

Mr. Walther, endeavoring to gain approval still, on September 20th notes that the pre-project seasonal high water line is at least 25 feet seaward of the proposed townhomes. Mr. Walther went to Tallahassee, met with another official with the Department of Environmental Protection, Mr. Barnett, who confirmed the establishment of policy by adopting the memorandum of Mr. Foster from June of 2006.

This meeting was also attended by Mr. McNeal, Tony McNeal, an engineer that I mentioned earlier, who also testified at trial. At that [18] meeting, it was very obvious there was not going to be an approval of the permit as requested. Mr. McNeal suggested a variance.

Mr. Walther recommended not to pursue a variance. He was of the opinion that any variance application would be denied because of what he terms the no-budge position of the Department of Environmental Protection, that the Foster analysis was correct and accurately stated the policy of DEP. Mr. McDowell also had suggested to redesign the project. And another engineer, Gene Chalecki, was of the opinion that variance would not be granted. Based upon this, no application for a variance was ever made.

On November 1st of the year 2006, Florida Department of Environmental Protection formally denied the

Beach Group permit application stating that no construction could occur seaward of what, at that time, was called the Coastal Construction Control Line. The Order was very comprehensive, goes on for quite a few pages, including a number of findings of fact and conclusions of law.

At that time, Beach Group hired counsel, William L. Hyde, Esquire, who is a former attorney with Department of Environmental Protection [19] predecessor group, that is the Department of Environmental Regulation. Mr. Hyde continued to represent Beach Group in negotiations with the DEP, including the Secretary of DEP. At a later administrative law hearing, Mr. Hyde also opined that a variance should not be sought because it was clear, at that time, to him, legally that it could not be obtained because of the interpretation of the statute; and that a variance could not be obtained from a statute, but only from a regulation.

February 15th and 16th of the year 2007 an administrative law judge, Judge T. Kent Wetherell, II, heard the case to determine whether the Beach Group application should be approved. He did rely on historical evidence, much of which I've noted: Beach erosion and renourishment. He relied upon the opinions of various experts and legal authority.

A few days later, April 19th, he issued a recommendation to deny the application for the Coastal Construction Line permit. The denial was predicated on the proposed constructions not being landward of the then established 30-year erosion projection.

On April 19th of the year 2007, the Secretary of Florida Department of Environmental Protection issued a Final Order on the exceptions the [20] Beach Group had made to the administrative law recommendation to make some modifications, but affirmed the permit denial.

Thereafter, a subsequent owner of that property and some adjacent property did make applications for a different 30-year projection. This was in 2010 and '11. And Mr. Foster, at that time, gave the same opinion and adopted and recommended continued projection of the 30-year erosion line, as he had with the subject permit application process.

The Florida Department of Environmental Protection, as I noted, had its Program Administrator Engineer, Tony McNeal, actually represent the Department at trial and he testified. His opinion at the time of trial is that the beach renourishment probably will continue at current levels into an indefinite future, but this is based upon the Board of Trustees of the Florida Internal Improvement Trust Fund statement that renourishments should continue and really is based upon federal monies for the project to continue.

The subject area, in general that is the 12,000 feet, is characterized by Mr. McNeal as a high erosion rate area; and Mr. McNeal notes that some 200 feet of beach has been lost in the prior seven [21] years before the time of trial.

Mr. Hyde, the lawyer – the trial lawyer for the Beach Group at the administrative trial, opines now

that the only effective use of the property is for a single family residence. However, there are some other opinions. Master of Science Environmental Planner Ethel Hammer opines that currently the property can be used for either six or three multi-family units and that it is not zoned for single family use, so probably would not be approved for single family use. She also opines that retail use is not viable because of a local requirement of retail needs to be ten foot above existing grade.

Ph.D. Economist Harry Fishkind opines that the Beach Group has lost over $10.5 million or some 96 percent of the profitability if it had built six units, rather than the 17 proposed.

Bachelor of Science Urban Planner Dennis Murphy opines that the site can now be used for eight or ten multi-family units similar to those originally envisioned by Beach Group, or 17 smaller units, some stacked in four-story flats.

MIA Appraiser Stephen Boyle opines that the uses suggested by Mr. Murphy would bring a gross sale of $3.5 million for eight units, $3.7 million for ten [22] units and $4.5 million for 17 units; and that the sales of the subject vacant land, as it is, in 2004 for $2.4 million – this was prior to the Beach repurchase or to the subject Beach Group property purchase – and in 2007 for $1.75 million, both were valid sales. He does not make any opinion concerning the $8.7 million 2005 purchase by Mr. Seltzer's group. Part of Mr. Boyle's analysis is based on apartment sales per year dropping from 2007, which appeared to be adversely affected by

the absorption rate of new construction and also the land cost.

Ultimately, the Beach Group investors lost the subject real property. An approximate $10 million judgment has been entered against Mr. Seltzer. On June 3 of the year 2011 the subject property was sold by Beach Group for some $1.8 million.

Those are the facts then as I've found them from the evidence. I'm going to take a couple of minutes now and prepare – or not prepare, excuse me – recite some conclusions of law.

Mr. Loeb, on the Petition to determine that there is a taking by adverse condemnation, you are prevailing and I'll ask you to prepare the Order. However, we may need to discuss, after I'm done here, a little bit more about the form of the Order, but [23] would you prepare the Order, please.

MR. LOEB: Yes, your Honor.

THE COURT: Now, first, I do conclude legally that this is an as-applied claim for taking without adequate procedures to provide just compensation. This is not a total taking and I do note that, therefore, the Plaintiffs must prove a substantial deprivation of the economic use of the affected real property.

In further ruling, I do note, first, that a defense of malpractice has been raised by the Florida Department of Environmental Protection. That defense is rejected. There is not a factual basis to support this claim. Further, any requirement to request a variance

is legally excused because such a request would have been futile. Further, there is a regulatory taking.

The economic impact on the Plaintiff is the loss of the initial land investment, that is the ultimate economic impact loss of the initial land investment; loss of costs of out-of-pocket and development expenditures. The regulation does interfere with the distinct investment-backed expectations to the extent that, at the time of investment, the Plaintiff did have a reasonable [24] expectation of a reasonable net profit on the sale of a developed townhouse condominium project. This has been lost because of an intervening regulatory change.

The character of the government action is a non-invidious, however, well-reasoned engineering and naturally based evidentiary decision to restrict the areas upon which beachfront development can occur so as to not allow permanent structures in an area likely to experience erosion within thirty years.

Concerning authority, legal authority, clearly the executive branch, that is the Department of Environmental Protection does have the authority and obligation to enforce – to create and enforce reasonable administrative regulations and to enforce the statutory laws created by the legislature in this case. And the DEP was legally authorized to administratively change the seaward limit of construction from the line of continuous construction so as to protect future landowners or tenants from loss because of anticipated erosion and thus refuse to issue the subject permit. The

Plaintiff does prove a taking envisioned by Article X Section 6 of the Florida Constitution, this of a substantial amount of economic use of the subject real property.

For these reasons, the Plaintiff's Petition [25] to Determine an Inverse Condemnation is granted. The case will be set for a jury trial on the issue of compensation for actual legally cognizable damages, this by separate notice for trial. All objections concerning what are compensable damages are reserved, will be taken as evidentiary matters and as jury instruction matters at the time of the jury trial.

Is the ruling complete; is there any question concerning the ruling?

MR. LOEB: Nothing from the Plaintiff, your Honor.

MR. GLOGAU: From the Defendant, your Honor, we don't have any questions.

THE COURT: At this point, the form of the Order probably should be just reciting those conclusions of law and the ultimate conclusion.

Is that what you envision then, Mr. Loeb?

MR. LOEB: It is, your Honor. And I think we can take what the court reporter has put down and take that and put it into an appropriate form, pass it by Mr. Glogau and his office as to its form, and then forward it to you for execution.

THE COURT: Perfect. Okay, go ahead and do that then. Then when you all are advised, notice the case for trial on the jury trial issues and I will [26] enter a Trial Order setting it for trial then.

MR. LOEB: Yes, your Honor.

THE COURT: Thank you very much.

MR. GLOGAU: Thank you, your Honor, for your time and your diligence.

THE COURT REPORTER: Do you want the whole transcript or just the Order?

THE COURT: Mr. Loeb, what are you seeking? The court reporter wants to know what you want from her.

MR. LOEB: If I could have just the transcript, if I could get it, you know, next two, three business days, that'd be fine.

THE COURT: You want it of everything or just the conclusions of law?

MR. LOEB: I think it'd probably be best, Judge, to get everything, just to make sure that we're – you know, we're staying true to what you've stated on the record this afternoon.

THE COURT: Okay. She has received your communication.

MR. GLOGAU: Your Honor, this is John Glogau. Would you ask the court reporter to send me a copy, as well, please.

THE COURT: Yes. She heard you and she [27] will.

THE COURT REPORTER: Who can I call for spellings?

MR. LOEB: This is Ethan Loeb. You can call my office and we'll be happy to help you out if there's any spelling issues.

THE COURT REPORTER: Thank you.

MR. LOEB: Yes, ma'am.

THE COURT: I'm fixin' to leave. Anything else you need me for?

MR. LOEB: No, your Honor. Thank you.

MR. GLOGAU: Thank you, your Honor.

THE COURT: You're welcome. Thank you. We're in recess then.

(Thereupon, at 4:00 p.m., the hearing was concluded.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
) SS
COUNTY OF MARTIN)

CERTIFICATE

I, MARCELLA R. SAMSON, a Shorthand Reporter and Notary Public of the State of Florida at Large, certify that the foregoing hearing was stenographically reported by me and is a true and accurate transcription of said hearing.

I certify further I am neither attorney nor counsel for, nor related to, nor employed by any of the parties to the action in which the hearing is taken and, further, that I am not a relative or an employee of any attorney or counsel employed in this case, nor am I financially interested in the outcome of this action.

DATED this 18th day of October, 2013.

/s/ Marcella R. Samson
MARCELLA R. SAMSON

THIS TRANSCRIPT IS DIGITALLY SIGNED

SHOULD THERE BE ANY CHANGE MADE,
THE SIGNATURE WILL DISAPPEAR

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL PROTECTION

BEACH GROUP INVESTMENTS, LLC,

Petitioner,

v.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
____________________________/

DOAH Case No. 06-4756
OGC Case No. 06-2317

FINAL ORDER

(Filed Jul. 11, 2007)

On April 19, 2007, an administrative law judge from the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP" or "Department"), a copy of which is attached as Exhibit A. The Recommended Order indicates that copies were served upon counsel for the Department and the Petitioner, Beach Group Investments, LLC ("Petitioner"). The Petitioner filed four exceptions, the Department filed 14 exceptions, and both parties filed responses. The matter is now before me as Secretary of DEP for final agency action.

BACKGROUND

On November 1, 2006, DEP entered a Final Order denying Petitioner's application for a permit for construction of 17 multi-family units in two four-story buildings, along with a pool, spa, and other appurtenances (Project), seaward of the Coastal Construction Control Line (CCCL).[1] The Petitioner's property is located at 222 South Ocean Drive, Fort Pierce, St. Lucie County, Florida, between DEP's reference monuments R-34 and 35 and just south of the Fort Pierce Inlet.

The Fort Pierce Inlet was constructed in the 1920's and is protected by two jetties that extend into the Atlantic Ocean. It has created conditions that facilitate severe erosion south of the inlet by preventing the littoral transfer of sand from north to south. In 1965, Congress authorized the first beach nourishment for the beach south of the inlet, which commenced in 1971 and expired in 1986. Another nourishment was authorized in 1996, which expires in 2021. From 1971 through the present, major and minor nourishments have occurred periodically.

The Department asserted in its Final Order that the Project fails to meet two requirements: that the

[1] Section 161.053, F.S., requires the Department to establish "coastal construction control lines on a county basis along the sand beaches of the state . . . so as to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions." A permit from the Department is required for any excavation or construction on property seaward of the established CCCL.

Project be landward of the 30-year erosion projection, and that the structures not impinge on the first dune. Petitioner timely filed a petition challenging the Final Order, and the petition was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge (ALJ).

In his Recommended Order, the ALJ recommended denial of the application, finding that the Project would be located seaward of the 30-year erosion projection. He also made alternative findings in the event his determination of the 30-year erosion projection was rejected, and the Project was found to be landward of the projection. In those alternative findings, the ALJ concluded that although a major structure of the Project would encroach on the frontal dune, the encroachment did not create a substantial adverse impact and did not provide a separate basis for denial of the application.

THE 30-YEAR EROSION PROJECTION

Petitioner's Project can only be permitted if it is landward of the 30-year erosion projection. The 30-year erosion projection is an estimate of the long-term shoreline recession and is calculated from historical data on the location of the mean high water line (MHWL), seasonal high water line (SHWL), rate of erosion, and the effects of beach nourishment projects. Rule 62B-33.024, Florida Administrative Code (F.A.C.). When the beach is part of a nourishment project, the first step in estimating the 30-year erosion

projection is to determine the pre-nourishment MHWL. A pre-nourishment project erosion control line (ECL)[2] can be used if one was established, but if an ECL was not established, then a pre-project MHWL is used. The second step in the analysis is to determine the pre-nourishment SHWL. The SHWL is defined as "the line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above mean high water." §161.053(6)(a)2., Fla. Stat. The third step is to calculate the erosion rate, which in this case was done by averaging the rate over a number of years. The fourth step is to determine the number of years left in the authorized nourishment project, and the final step is to establish the 30-year erosion projection by multiplying the erosion rate by the difference between 30 years and the number of years remaining in the nourishment program and adding that distance to the pre-project SHWL.

Although agreeing on the process, the Parties' experts established two different 30-year erosion projections, because they used different starting points and erosion rates. The Petitioner's expert used the ECL established in 1997 for the latest beach nourishment authorization, while the Department's expert used a MHWL surveyed in 2002, which he asserted closely approximated the South Beach High Tide line (SBHTL) established in 1968, before the first nourishment in

[2] The ECL, as defined in §161.151(3), Florida Statutes, is established pursuant to §161.144, Florida Statutes, before a beach nourishment project.

1971. A background issue in determining the appropriate pre-nourishment line is whether the nourishment project is a stand-alone project or one that is part of an on-going series of projects that can be considered as a single continuous nourishment project. The ALJ found that the 1968 SBHTL is the appropriate starting point, because the present nourishment project is a continuation of the earliest project authorized in 1969 and started in 1971.

The pre-nourishment SHWL can be surveyed or, if a survey is not available, calculated by determining its location on the beach based the location of the MHWL and the magnitude of the local mean tidal range. The distance between the MHWL and SHWL is dependent on the slope of the beach; the more gentle the slope of the beach, the greater the distance between the two lines. The Petitioner's expert, Michael Walther, estimated the SHWL was 26.4 feet landward of the 1997 ECL, while the Department's expert, Emmet Foster, estimated the SHWL was between 50 and 75 feet landward of the 2002 MHWL. The ALJ found that the pre-nourishment SHWL was approximately 40 feet landward of the SBHTL.

The parties also disagreed on the appropriate erosion rate. The Petitioner's expert calculated a rate of -3.3 ft/yr based upon data collected between 1930 and 1968. The Department's expert calculated a rate of -7 ft/yr based upon data collected between 1949 and 1967. The ALJ found that a rate of -7 ft/yr was appropriate.

RULINGS ON PETITIONER'S EXCEPTIONS

Petitioner raises four exceptions, which concern the variables used to determine the proper location of the 30-year erosion projection and the appropriate rate of erosion. **Exception #1:** In its first exception, Petitioner asserts that Findings of Fact 45 and 46 establishing the SBHTL as the appropriate starting point for the 30-year erosion projection are inconsistent with the statutes, rules, and prior Department practice. The Petitioner argues that the ECL established in 1997 just prior to the most recent beach nourishment project authorization must be the appropriate starting point, because otherwise its establishment would have been an empty exercise. Unlike the ECL, the 30-year erosion projection is designed to predict the landward location of long-term erosion for the protection of structures constructed seaward of the CCCL. The two purposes are not the same, and the Department's rules anticipate that they may not be coextensive in all cases. Rule 62B-33.024(2)(d)3, F.A.C.

Selecting the appropriate starting point turns in part on whether a beach nourishment project is "either a one-time beach construction event or a long-term series of related sand placement events." In this regard, the ALJ found in Finding of Fact 26 that the present beach nourishment "is a continuation of the project started in 1971 rather than a separate and distinct project," which is supported by the testimony of Mr. Foster. (T VII 280-282) Rule 62B-33.024(2)(d)3, F.A.C., provides in part that "If the ECL is not based on a pre-project survey MHWL, then a pre-project survey

MHWL shall be used instead of the ECL." Since the ALJ found the nourishment project essentially started in 1971 and not 1997, the proper starting point was the pre-1971 MHWL, which he determined was best represented by the 1968 SBHTL. This finding is based on competent substantial evidence, and, thus, I cannot reject or modify it. *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

The Petitioner argues that the 1997 ECL is the more appropriate starting point, since "the Department assumes that as long as federal authorization for a nourishment project remains in place, the beach will be maintained seaward of the ECL." Petitioner goes on to argue that "the Corps is committed to maintaining the beach seaward of the ECL, although it does not cite to the record in support of this contention. These "facts" were apparently only advanced by the Respondent's expert, Michael Walther, and not adopted by the ALJ. (T VI 96-97) At best, it appears to be either hearsay that does not support non-hearsay evidence or an inference upon which Mr. Walther has no competency to opine. In either case, it cannot constitute the basis for a finding of fact. However, even if the testimony was competent and not hearsay, an ALJ is not required to accept the testimony of an expert or lay witness, even if such testimony is unrebutted. *Thompson v. Dept. of Children and Families*, 835 So.2d 357, 360 (Fla. 5th DCA 2003); *Dept of Highway Safety v. Dean*, 662 So.2d 371, 372 (Fla. 5th DCA 1995).

Petitioner points out that the Department used the 1997 ECL as the starting point in two earlier

CCCL permit applications and that the Department's expert, Mr. Foster, admitted he erred in doing so. (Finding of Fact 43, footnote 4) Petitioner argues that these previous errors by the Department prevent it from rectifying that error in this case. In other words, the Petitioner argues that it should benefit from an erroneous starting point. Petitioner is correct when it argues that an agency must provide a reasonable explanation for inconsistent results based on similar facts, *St. Johns Utility Corp. v. Florida Public Service Commission*, 459 So.2d 895 (Fla. 3rd DCA 1989), but it is incorrect when it asserts that a rectifying a prior error is not a "reasonable explanation." The ALJ found that Mr. Foster had been unaware of the complete background of the 1997 ECL and the extent of nourishments in the 1980's and 1990's when the earlier opinions had been rendered, and had he been aware, he would have notified the Department of the problem of using the 1997 ECL. (Finding of Fact 44; T VIII 320-321) I find that this is a completely reasonable explanation for inconsistent results; as facts became known to the Department, it reevaluated its position. Given this, the Department would have been capricious if it had *not* changed its position. The Department did not act arbitrarily or capriciously; rather, it acted responsibly. Under the Respondent's argument, an agency could never rectify past errors and would be constrained to repeat its past mistakes in order to maintain consistency.

In sum, I find that the ALJ's decision to use the 1968 SBHTL as the appropriate pre-nourishment surveyed MHWL and the starting point for determining

the 30-year erosion projection is supported by competent substantial evidence and reject the Petitioner's first exception.

Exception #2: Petitioner takes exception to Findings of Fact 53-57, arguing that the ALJ's location of the pre-nourishment SHWL was contrary to the evidence. Petitioner urges that its expert, Mr. Walther, used the appropriate methodology in §161.053(6)(a)2., F.S., and his determination should be accepted. Mr. Walther derived the distance between the MHWL and the SHWL as 26.4 feet based on data from June 2005. (Finding of Fact 48) However, the ALJ specifically rejected Mr. Walther's estimate as unreasonable "because it was based upon survey data taken immediately after a 'major' beach nourishment when the shoreline was unnaturally steep and, hence, not representative of 'pre-project' conditions." (Finding of Fact 53) Mr. Foster testified that the distance between the MHWL and SHWL can vary in time and will be shorter on a steeply sloping beach than on a more gradually sloping beach; it usually takes more than one year after a nourishment for a beach to reach a more natural slope. (T. Vol. III 298-299, 322-323) Thus, I find there is competent substantial evidence to support the ALJ's decision to reject Mr. Walther's estimate of the pre-nourishment SHWL. As such, I cannot reweigh the evidence and substitute an alternate finding. *Martuccio v. Dept. of Professional Regulation*, 622 So.2d 607 (Fla. 1st DCA 1993).

Petitioner's criticism of Mr. Foster's methodology is misplaced since the ALJ also rejected his estimate of

the MHWL-to-SHWL distance as too high. However, the ALJ accepted Mr. Foster's expert opinion that the range of the distance depends in part on how soon the measurements are made after a nourishment and that the distance averages about 40 feet in the area. (T VIII 322-326) I find that the ALJ's determination that 40 feet best represented the distance between the pre-nourishment MHWL and SHWL is reasonable and based upon competent substantial evidence. Accordingly, I reject this exception.

Exception #3: Petitioner takes exception to Findings of Fact 62-66, in which the ALJ established the applicable erosion rate of -7 ft/yr. Petitioner argues that the longer data set used by its expert gives a better basis for accurately estimating how fast the beach will erode in the future. Mr. Walther, Petitioner's expert, used a data set from 1930 through 1968, while Mr. Foster used a data set from 1949 through 1968. Since the average erosion rates in the 1930-1949 period were significantly lower, the overall average rate in Mr. Walther's estimate (-3.3 ft/yr) was significantly lower than Mr. Foster's (-7 ft/yr).

Petitioner argues that the ALJ improperly ignored Mr. Walther's justification for using low-erosion rate years of 1930-1949, which was based in part on Mr. Walther's understanding that NOAA was predicting less intense hurricane activity by 2021 at the expiration of the nourishment contract. Contrary to the Petitioner's assertion, Mr. Walther's testimony on the influence of hurricanes on the intensity of recent erosion rates was contested by Mr. Foster. Mr. Foster

opined that the recent high rate of beach erosion in the area could not be fully explained by increased hurricane activity. (T III 302-304) Apparently, Mr. Walther's testimony about the NOAA predictions of hurricane activity 13 years into the future was too speculative for the ALJ. Additionally, it appears the ALJ was concerned that the lower erosion rate did not adequately account for the rapid erosion occurring recently as evidenced by the "major" nourishments in 1999, 2003, 2004, 2005, and the one planned for 2007, and the unsuccessful efforts to control the erosion with jetties, groins, and riprap. (Findings of Fact 23, 27-28, 65) Rule 62B-33.024, F.A.C., provides in part that in the calculation of the 30-year erosion projection, "Data from periods of time that clearly do not represent current prevailing coastal processes acting on or likely to act on the site shall not be used," and after a review of the record, I find no fault with the ALJ's analysis.

Again, Petitioner argues that DEP was improperly inconsistent in its use of the -7 ft/yr erosion rate and that it previously had used a -3.3 ft/yr rate for a project that was located approximately 4000 feet south of Petitioner's Project. (T VI 83) Mr. Foster explained that he did not know why the Department had arrived at that erosion rate since it was calculated by another individual, but the ALJ found that the lower erosion rate used in that application was based on data from a period of post-nourishment, which would skew the results and justified the use of a more appropriate pre-nourishment database in this case. (Finding of Fact 62) While the ALJ criticized Mr. Foster's use of the

shorter dataset, his rate of -7 ft/yr is consistent with that derived by the Army Corps of Engineers and has been used on occasion by Mr. Walther's consulting firm, Coastal Tech. (Finding of Fact 61; T V1 [sic] 112-113; DEP Exhibits 17 and 18) From my review of the record, I find that the ALJ's conclusion that the -7 ft/yr rate is appropriate in this case and is based on competent substantial evidence, and I reject the Petitioner's third exception.

Exception #4: In this exception, the Petitioner excepts to the ALJ's determination in the mixed Finding of Fact and Conclusion of Law 113 that its Project extends seaward of the 30-year erosion projection. For the reasons stated above, I reject this exception.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

The Department filed 14 exceptions, most of which relate to the ALJ's finding that the Project does not improperly impinge on the most seaward dune.

Exception #1: In its first exception, the Department urges me to reject Finding of Fact 15 as irrelevant and immaterial. This finding is based upon a stipulation of the parties that Petitioner's Project received an environmental resource permit. The Department is concerned that the ALJ would rely on this fact in his deliberations. However, I find that he did not rely on this stipulation in his recommended order, and its inclusion is merely background and not substantive. Thus, I reject the exception.

Exception #2: The Department excepts to the second part of the second sentence of Finding of Fact 22, which provides that St. Lucie County has requested authorization to nourish the beach "for another 50 years." This finding, derived from the testimony of Mr. Walther, is hearsay that does not supplement otherwise admissible evidence. Further, it is not admissible simply because it was uttered by an expert; to be admissible under §90.704, F.S., the hearsay evidence must be "facts or data upon which an expert bases an opinion," *Masters v. State of Florida*, 2007 Fla. App. LEXIS 7591 (Fla. 5th DCA 2007); *Linn v Fossum*, 946 So.2d 1032 (Fla. 2006), and no relevant opinion of Mr. Walther was based on this fact. Although, I find that the ALJ did not rely on this finding in his conclusions and specifically stated that is [sic] was not a basis of consideration (Finding of Fact 111), the Department's exception is well-taken. I accept this exception, and the second part of the second sentence of Finding of Fact 22 is striken [sic].

Exception #3: In this exception, the Department asks me to replace the term "ECL" with "MHWL" in Findings of Fact 37 and 38. The Department argues that the ALJ use of the term ECL is a mistaken reference. I agree with the Department in this regard. It appears that the ALJ confused the two terms, and although he correctly recites the legal basis for determining the pre-nourishment starting point (Finding of Fact 35), he improperly uses the term "ECL" in these Findings. The change is not substantive and is merely clarifying. Thus, I accept the Department's exception

and replace the terms "ECL" with "MHWL" in Finding of Fact 37 and "pre-nourishment ECL" with "pre-nourishment MHWL" in Finding of Fact 38.

Exception #4: The Department has three issues with Finding of Fact 49. First, it asserts that the ALJ mischaracterizes how Mr. Foster determined the SHWL in the first sentence. The sentence is confusing, but after reviewing the transcript and examining DEP Exhibit 6, it appears the ALJ is referring to the way that Mr. Foster estimated the SHWL by connecting three survey points as a straight line, which ended up intersecting the vegetated dunes, rather than meandering around them. The Department also takes issue with the second part of the second sentence in Finding of Fact 49. I agree with the Department that the sentence is unclear. It appears he was referring to survey points for the SHWL at the northern end of the property and seaward of the straight line representing the SHWL. (See Finding of Fact 54) Regardless, the ALJ rejects Mr. Foster's estimate of the pre-project SHWL for several reasons and uses his own estimate (Finding of Fact 54), which means the sentence is merely background. Thus, I decline to strike either of these sentences. Finally, I agree with the Department's assertion that the ALJ's reference to the "best fine line" is a typographical error and should be the "best fit line."

In sum, the reference to "best fine line" is changed to "best fit line," and the rest of the exception is denied.

Exception #5: The Department takes exception to the second part of the last sentence of Finding of Fact 79, which recites the anticipated sales price of the units, as not relevant. I agree that the finding is irrelevant to the issue of whether the Department should grant or deny Petitioner's permit application and thus, I grant the exception.

Exception #6: The Department asks me to strike the characterization of the financial viability of the Project in Finding of Fact 80 as immaterial. I agree that this finding, to the extent that it is one, is irrelevant as to whether the Department should grant or deny the Petitioner's permit application, and thus, I grant the exception.

Exceptions #7, 8, 9, 10, 11, 13, and 14: In these exceptions, the Department is concerned with the ALJ's findings and conclusions concerning the construction of a portion of the Project on the frontal dune (Findings of Fact 92, 97-102 and Conclusions of Law 116-119 and 123-128). In short, the ALJ found that although the Project requires "minor excavation of the frontal dune" landward of the crest of the dune, the excavation will be adequately mitigated, and the Project design "will allow the beach-dune system to fluctuate under the structures during storm events." (Findings of Fact 93-99) The ALJ reasoned that since there is no express prohibition against construction on the frontal dune, the impacts will not destabilize it, and the mitigation will increase the height and amount of vegetation on the dune, the purpose of Rule 62B-33.005(8) is satisfied. The ALJ concluded that if his determination

that the Project is seaward of the 30-year erosion projection is rejected, then the Project can be approved.

The Department urges me to reject the findings and conclusions because they are irrelevant given the ALJ's conclusion that the Project cannot be constructed because it is seaward of the 30-year erosion projection. Additionally, the Department argues that the ALJ failed to properly apply the rules concerning construction seaward of the CCCL in two ways. First, the ALJ should have first determined whether Petitioner minimized the impacts of the Project to the dune before considering whether the mitigation was sufficient, i.e., the ALJ should never have considered mitigation. Second and regardless of the failure to minimize impacts, the rules prevent the construction of major structures on the frontal dune.

In Conclusion of Law 114, the ALJ states "In light of this conclusion [that the Project extends seaward of the 30-year erosion projection], it is not necessary to determine whether the Project otherwise satisfies the applicable CCCL permitting requirements." I agree and decline to adopt these findings of fact and conclusions of law. My findings on the Petitioner's exceptions concerning the location of the 30-year erosion projection are dispositive, and I find it is neither necessary nor appropriate to make "contingent" findings on the issues related to the interpretation of Rule 62B-33.005, F.A.C. Accordingly, I accept these exceptions and decline to adopt the Findings of Fact 97-102 and Conclusions of Law 116-119 and 123-128 in this Final Order.

Exception #12: The Department excepts to the statement in Conclusion of Law 121, in which the ALJ states in essence that the only issues in dispute relate to the location of the 30-year erosion projection and whether the Project violates the restrictions in 62B-33.005 on the location of major structures. The Department contends that the Project also did not have the necessary county approvals required in Rule 62B-33.008(3)(d), through Rule 62B-33.005(4). Petitioner points out that this issue was not raised in the pre-hearing stipulation. While this is a *de novo* proceeding, the Petitioner is only required to address issues that were specifically identified. In this instance the burden was on the Department to "identify the areas of controversy" in the formal proceeding. *J.W.C. Co.*, 396 So.2d at 789; *Woodholly v. Dept. of Natural Resources*, 451 So.2d 1002, 1004 (Fla. 1st DCA 1984). In addition, during the hearing the parties and the ALJ reached agreement on the contested issues, and this issue was not raised. (T VII 195-197) However, I would note that had the Department properly raised the issue, it appears the Petitioner would not have met this requirement since the county authorization had expired by the time of the hearing. Given that the Department did not timely raise this issue, the exception is denied.

It is therefore ORDERED:

1. As modified by the above rulings, the Recommended Order is otherwise adopted and incorporated by reference herein.

2. Beach Group Investment, Inc.'s application for a CCCL Permit in DEP File No. SL-224 is DENIED. This denial should not be construed as a statement of denial of any development potential for the subject parcel. The Department is denying the specific proposal based upon the information submitted by the applicant and evidence presented at hearing.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the DEP clerk in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the DEP clerk.

DONE AND ORDERED this 11th day of July 2007, in Tallahassee, Florida.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

/s/ Michael W. Sole
Michael W. Sole
Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT
TO § 120.52, FLORIDA STATUTES,
WITH THE DESIGNATED DEPARTMENT
CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

/s/ Lea Crandall 7/11/07
CLERK Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

William L. Hyde, Esq.
Fowler, White, Boggs, Banker, P.A.
101 N. Monroe St., Suite 1090
Tallahassee FL 32301

Ann Cole, Clerk and
David M. Maloney, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand-delivery to:

Kelly L. Russell, Esq.
3900 Commonwealth Blvd.
MS-35
Tallahassee FL 32399-3000

this 11th day of ~~June~~ July, 2007

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ David Thulman
DAVID K. THULMAN
Assistant General Counsel
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

EXHIBIT "A"

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEACH GROUP INVESTMENTS, LLC, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	Case No. 06-4756

RECOMMENDED ORDER

(Filed Apr. 19, 2007)

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on February 15-16, 2007, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William L. Hyde, Esquire
Fowler White Boggs Banker, P.A.
Post Office Box 11240
Tallahassee, Florida 32302-3240

For Respondent: Kelly L. Russell, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection should approve Petitioner's application for a coastal construction control line permit.

PRELIMINARY STATEMENT

On November 1, 2006, the Department of Environmental Protection (Department) issued a proposed final order denying Petitioner's application for a coastal construction control line (CCCL) permit. Petitioner timely requested an administrative hearing on the denial of its permit application, and on November 21, 2006, the Department referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

The final hearing was initially scheduled for April 4-5, 2007, in Ft. Pierce, but it was rescheduled for February 15-16, 2007, in Tallahassee at the parties' request. The parties filed a Joint Pre-hearing Stipulation on February 12, 2007.

At the final hearing, Petitioner presented the testimony of Michael Walther and Harold Seltzer and the Department presented the testimony of Tony McNeal, Michael Barnett, and Emmett Foster. The following exhibits were received into evidence: Petitioner's Exhibits (Pet. Ex.) 1, 2, 9 through 11, 15 through 17, 19 through 27, 29 through 35, 36A through 36C, and 37 through 39; and Department's Exhibits (Dept. Ex.) 5 through 13, 16 through 19, 21 through 23, 24A through 24N, and 25 through 27. Official recognition was taken of Section 161.053, Florida Statues (2006),[1] and Florida Administrative Code Rule Chapter 62B-33.

The three-volume Transcript of the final hearing was filed on March 1, 2007. The parties requested 21 days from that date to file proposed recommended orders (PROs), but the deadline was subsequently extended to March 30, 2007, upon Petitioner's unopposed motion. The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

A. Stipulated Facts[2]

1. Petitioner, Beach Group Investments, LLC (Beach Group), is a limited liability corporation under

Florida law. Its address is 14001 63rd Way North, Clearwater, Florida 33760.

2. On December 19, 2005, Coastal Technology Corporation (Coastal Tech) on behalf of Beach Group submitted to the Department an application for a CCCL permit pursuant to Chapter 161, Florida Statutes, to construct 17 luxury townhome units in two four-story buildings, a pool, a dune walk-over, and ancillary parking and driveway areas (hereafter "the Project"). The Department designated the application as File No. SL-224.

3. The property on which the Project is proposed (hereafter "the Property") is located between the Department's reference monuments R-34 and R-35, in St. Lucie County. The Property's address is 222 South Ocean Drive, Fort Pierce, Florida.

4. The Property is located seaward of the CCCL line established in accordance with Section 161.053, Florida Statutes, and Florida Administrative Code Rule Chapter 62B-33.

5. On April 21, 2006, the application was determined to be complete.

6. By letter dated June 5, 2006, the Department notified Beach Group that the Project appeared to be located seaward of the 30-year erosion projection of the seasonal high water line (SHWL), and that in accordance with Section 161.053(6), Florida Statutes, the staff could not recommend approval of the Project since

major structures are seaward of the estimated erosion projection.

7. By letter dated July 7, 2006, and subsequent submittals, Beach Group requested a waiver of the 90-day time period for processing completed applications pursuant to Chapter 120, Florida Statutes, until October 31, 2006.

8. On August 30, 2006, Beach Group submitted a certified engineering analysis of the 30-year erosion projection of the SHWL for the Department's consideration pursuant to Florida Administrative Code Rule 62B-33.024(1). Beach Group's analysis determined that the proposed major structures associated with the Project were located landward, not seaward, of the 30-year erosion projection.

9. The Department also performed its own 30-year erosion projection of the SHWL, and determined that the proposed major structures were located seaward, not landward, of the 30-year erosion projection. The Department asserts that the proposed structures are located between 87 feet and 68 feet seaward of the Department's determination of the 30-year erosion projection.

10. The Department disagreed with Beach Group's analysis because the analysis appeared to be inconsistent with Section 161.053(6), Florida Statutes, Florida Administrative Code Rule 62B-33.024, and the Department's own analysis.

11. The Property is located just south of the Fort Pierce Inlet, and landward of a federally maintained beach restoration project that had approximately 14 years of life remaining under the existing Congressional authorization when the permit was submitted to the Department.

12. By proposed Final Order dated November 1, 2006, the Department provided to Beach Group notice of its intent to deny the permit application.

13. The proposed Final Order was received by Beach Group on November 8, 2006. Beach Group's petition for hearing was timely filed with the Department.

14. Since the Department proposes to deny Beach Group's CCCL permit application, its substantial interests are clearly at issue, and it has standing to maintain this proceeding.

15. On December 11, 2006, the Department issued an environmental resource permit for the Project.

16. The Department denied Beach Group's permit application because the Project extends seaward of the 30-year erosion projection calculated by the Department and because the Project's impacts to the beach-dune system had not been minimized. The permit was not denied on the basis of the existence, or absence, of a line of continuous construction in the vicinity of the Project.

B. The 30-year Erosion Projection

(1) Background

17. Fort Pierce Inlet (hereafter "the inlet") was constructed by the Army Corps of Engineers in the 1920's. The channel of the inlet is protected by two jetties that extend several hundred feet into the Atlantic Ocean.

18. The jetties act as a barrier to the littoral transfer of sand from the north to south that would otherwise occur along the beach in the vicinity of the Property. The jetties cause accretion on the beach to the north of the inlet and erosion of the beach to the south of the inlet.

19. The inlet channel beyond the jetties also restricts the littoral transfer of sand in the area. The deepening and widening of the channel in 1995 likely contributed to the increased erosion observed south of the inlet in recent years.

20. The beach to the south of the inlet, including that portion on the Property, is designated as a "critically eroded beach" by the Department. The inlet is the primary cause of the erosion.

21. Congress first authorized beach nourishment south of the inlet in 1965. That authorization expired in 1986.

22. Congress "reauthorized" beach nourishment south of the inlet in 1996. That authorization expires

in 2021, but St. Lucie County has requested that the authorization be extended for "another 50 years."

23. The first "major" beach nourishment south of the inlet occurred in 1971. Subsequent "major" nourishments occurred in 1980, 1999, 2003, 2004, and 2005. Another "major" nourishment is planned for 2007.

24. There was a "moderate" nourishment of the beach in 1995, which included the placement of geotextile groins on the beach just to the north of the Property. "Small" nourishments occurred in 1973, 1978, 1987, 1989, 1990, 1992, 1994, 1997, and 1998.

25. Cumulatively, the nourishments that occurred between the "major" nourishments in 1980 and 1999 involved approximately 419,000 cubic yards of sand, which is more than the volume involved in several of the "major" nourishments.

26. Beach nourishment south of the inlet has been an ongoing effort since it started in 1971. The more persuasive evidence establishes that the nourishment project that is authorized through 2021 is a continuation of the project started in 1971 rather than a separate and distinct project.

27. Various erosion control efforts have been used south of the inlet in conjunction with the beach nourishment efforts. For example, geotextile groins (which are essentially massive sandbags) have been installed and removed on several occasions since the mid-1990's in order to "temporarily stabilize the shoreline until such measures could be taken to design,

permit and construct a long-term solution"; concrete rubble and other riprap has been placed on the beach over the years (without a permit from the Department) to protect upland structures from erosion; and a "spur jetty" was constructed on the south jetty in an effort to reduce erosion south of the inlet.

28. These efforts have not slowed the pace of the erosion or minimized the need for beach nourishment south of the inlet. Indeed, the need for and frequency of "major" nourishments south of the inlet have increased in recent years.

29. Beach erosion south of the inlet will continue to be a serious problem so long as the inlet exists and the jetties remain in place. There is no reason to expect that the inlet or the jetties will be removed in the foreseeable future and, as a result, beach nourishment south of the inlet will continue to be necessary.

30. The Department has recognized the need for continuing nourishment of the beach south of the inlet, as reflected in both the Strategic Beach Management Plan for the St. Lucie Beaches and the Ft. Pierce Inlet Management Study Implementation Plan. Those plans acknowledge the long-term need for continued nourishment of the beach at a rate of at least "130,000 cubic yards on an average annual basis." The plans do not, however, guarantee that future beach nourishment in the area will occur at that, or any, rate.

(2) Rule Methodology

31. Florida Administrative Code Rule 62B-33.024 contains the methodology for determining the 30-year erosion projection, which is the projected location of the SHWL 30 years after the date of the permit application under review.

32. Where, as here, the beach at issue is subject to an ongoing beach nourishment project, the methodology requires consideration of "pre-project" conditions – *i.e.*, the conditions that existed before the beach nourishment efforts started – because those conditions are used to project how the beach will migrate landward in the periods over the next 30 years when there may not be any beach nourishment activity.

33. The coastal engineering experts presented by the parties – Michael Walther for Beach Group and Emmett Foster for the Department – used essentially the same methodology to determine the location of the 30-year erosion projection. However, the variables that they used in each step of the methodology differed.

(a) Step 1: Locate the Pre-Project MHWL

34. The first step in determining the 30-year erosion projection is to locate the pre-project MHWL.

35. If a pre-project erosion control line (ECL)[3] has been established in the area, it is to be used as the starting-point for the determination of the 30-year erosion projection. Otherwise a pre-project survey of the MHWL is to be used as the starting-point.

36. Mr. Walther used a 1997 ECL as the starting point for his analysis. Mr. Foster used a March 2002 survey of the MHWL as the starting point for his analysis because he did not consider the 1997 ECL to be an appropriate pre-project ECL.

37. The March 2002 survey of the MHWL is not itself an appropriate starting point for the analysis. The survey is not a "pre-project" survey, no matter how the project is defined; the survey occurred more than 30 years after the nourishments started in 1971, and three years after the first "major" nourishment pursuant to the Congressional reauthorization of the project. Moreover, as discussed below, there is an appropriate pre-project ECL in the area.

38. There are two lines that might be considered to be a pre-project ECL in this case – (1) the ECL established in 1997, and (2) the South Beach High Tide Line (SBHTL) established in 1968.

39. The 1997 ECL was established based upon a survey of the MHWL performed on May 5, 1997. The survey occurred two years after a "moderate" beach nourishment and the placement of the geotextile groins on the beach. There was also a "small" nourishment in 1997, but the record does not reflect whether that nourishment occurred before or after the survey.

40. The SBHTL was established based upon a survey of the MHWL between 1966 and 1968, prior to the initial nourishment of the beach south of the inlet. It is approximately 65 feet landward of the 1997 ECL.

41. The SBHTL is the functional equivalent of an ECL, and it roughly corresponds to the "best fit line" for the March 2002 survey used by Mr. Foster as the starting point for his determination of the 30-year erosion projection in this case.

42. The Department contends that the 1997 ECL is not based upon a "pre-project" survey of the MHWL because the applicable beach restoration project south of the inlet began in the 1970's and has been ongoing since that time. Beach Group contends that the applicable project is the current one that is authorized through 2021, and that the 1997 survey preceded the start of the nourishments authorized by that project.

43. The Department has used the 1997 ECL as the starting-point for determining the 30-year erosion projection in several prior permits in the vicinity of the Project,[4] and in an April 9, 1999, memorandum discussing the 30-year erosion projection in the vicinity of monuments R-35 and R-36, Mr. Foster stated that "the ECL represents the pre-project [MHWL]."

44. Mr. Foster no longer considers the 1997 ECL to be the appropriate pre-project MHWL for purposes of determining the 30-year erosion projection south of the inlet. He testified that had he been aware of "the complete background" of the 1997 ECL and the extent of the nourishments in the 1980's and 1990's, he would have brought the issue to the Department's attention so that the Department could consider whether the 1997 ECL or "an earlier prenourishment line" was the appropriate pre-project MHWL.

45. Although it is a close question, the more persuasive evidence presented at the final hearing establishes that the 1997 ECL is not an appropriate pre-project MHWL because the applicable "project" includes the beach nourishment efforts started in 1971 that have continued through the present, even though those efforts were intermittent at times.

46. Thus, the appropriate starting point for determining the location of the 30-year erosion projection is the SBHTL, not the 1997 ECL used by Mr. Walther or the March 2002 MHWL survey used by Mr. Foster.

(b) Step 2: Locate the Pre-Project SHWL

47. The second step in determining the 30-year erosion projection is to determine the location of the pre-project SHWL.

48. Mr. Walther located the pre-project SHWL 26.4 feet landward of the 1997 ECL. That is the surveyed distance between the MHWL and SHWL in June 2005.

49. Mr. Foster located the pre-project SHWL at the most landward location that the SHWL was surveyed in March 2002. The line is between 50 and 75 feet[5] landward of the "best fine" line used by Mr. Foster as the pre-project MHWL, and it is as much as 25 feet landward of the surveyed location of the SHWL in some areas.

50. Mr. Foster used "an average [of] 50 feet" as the MHWL-to-SHWL distance in his analysis of several prior permits in the vicinity of the Project.[6]

51. Mr. Foster testified that the distance between the MHWL and SHWL in this area varies "from the 20s in the immediate post-nourishment situations . . . all the way up to 70-some feet" and that the [sic] "the averages gravitate towards 40 feet."

52. Consistent with that testimony, the distance between the surveyed locations of the MHWL and SHWL depicted on Department Exhibit 6 is approximately 40 feet, on average.

53. The MHWL-to-SHWL distance calculated by Mr. Walther is not a reasonable projection of the pre-project distance because it was based upon survey data taken immediately after a "major" beach nourishment when the shoreline was unnaturally steep and, hence, not representative of "pre-project" conditions.

54. The SHWL located by Mr. Foster is also not a reasonable projection of the pre-project SHWL because it was based upon a March 2002 survey (which is clearly not "pre-project"); because it used the most landward surveyed location of the SHWL rather than a "best fit" line or an average of the distances between the surveyed MHWL and SHWL; and because it runs across areas of well-established dune vegetation.

55. In sum, the MHWL-to-SHWL distance calculated by Mr. Walther (26.4 feet) is too low, whereas the distance resulting from Mr. Foster's siting of the

SHWL based on the March 2002 survey (50 to 75 feet) is too high. Those distances are essentially endpoints of the range observed in this area, as described by Mr. Foster.

56. A more reasonable estimate of the pre-project MHWL-to-SHWL distance is approximately 40 feet. *See* Findings 51 and 52.

57. Thus, the pre-project SHWL is located 40 feet landward of and parallel to the SBHTL. That line is not depicted on any of the exhibits, but on Petitioner's Exhibit 37, it roughly corresponds to a straight line between the points where the red-dashed line intersects the Property's north and south boundaries.

(c) Step 3: Calculate the Erosion Rate

58. The third step in determining the 30-year erosion projection is to calculate an erosion rate.

59. The erosion rate used by Mr. Foster was -7 feet per year (ft/yr). That rate was calculated based upon an average of the shoreline change data for monument R-35 for the period from 1949 to 1967. The rate would have been higher had Mr. Foster averaged the rates for the nearby monuments.[7]

60. The erosion rate used by Mr. Walther was -4.9 ft/yr. That rate was calculated based upon an average of the shoreline change data for monuments R-34 to R-39 over the period of 1930 to 1968.

61. An erosion rate of -7 ft/yr south of the inlet was referenced in permit applications submitted by Mr. Walter's firm, Coastal Tech, for several shore protection structures south of the inlet; was used by Mr. Foster in his review of several prior CCCL permit applications south of the inlet; and was included in reports on the inlet prepared by the Army Corps of Engineers over the years.

62. An erosion rate of -3.3 ft/yr was used and accepted by the Department in its review of another permit application in the general vicinity of the project.[8] That erosion rate was based upon data from the period of 1972 to 1994, which is after the beach nourishment started south of the inlet.

63. It is not entirely clear why Mr. Foster chose to use a data set starting in 1949, particularly since his report stated that the "1928-30 survey already shows significant erosion occurring south of the inlet." His testimony did not adequately explain the choice of that data set.

64. The use of a longer data set is typically more appropriate when calculating a historical rate. In this case, however, the use of the shorter period of 1949-68 is reasonable because the 1930-49 erosion rate was considerably lower than the 1949-68 rate,[9] which has the effect of skewing the erosion rate calculated for the longer period of 1930-68.

65. The higher erosion rate calculated by Mr. Foster also better takes into account the increased frequency of the nourishments in recent years as well as the continued need for shore stabilization in the area.

66. In sum, the higher erosion rate of -7 ft/yr calculated by Mr. Foster using the 1949-68 data set better reflects the historical post-inlet, pre-nourishment erosion rate than does the lower erosion rate calculated by Mr. Walther.

(d) Step 4: Determine the Remaining Project Life

67. The fourth step in determining the 30-year erosion projection is to determine the "remaining project life" of the "existing" beach nourishment project.

68. It was stipulated that there are 14 years remaining until the currently authorized federal beach restoration project expires.

69. It is reasonable to expect that beach nourishment south of the inlet will continue well beyond the expiration of the current federal project, but there were no other funded and permitted projects in place at the time Beach Group's permit application was filed.

70. Potential future beach nourishment projects are not considered "existing" under the rule methodology in Florida Administrative Code Rule 62B-33.024 unless they are funded and permitted at the time the application at issue is filed.

71. Mr. Walther used the 14-year remaining life of the existing federal project in his calculation of the 30-year erosion projection, as did Mr. Foster.

72. The "remaining project life" applicable to this case is 14 years, notwithstanding the likelihood of continued beach nourishment in the area beyond the expiration of the existing project.

(e) Step 5: Calculate the 30-year Erosion Projection

73. The final step in determining the location of the 30-year erosion projection is a calculation using the variables determined in the previous steps.

74. The calculation is as follows: first, the remaining project life determined in step four is subtracted from 30; then, that result is multiplied by the erosion rate determined in step three to get a distance; and, finally, the SHWL is moved that distance landward of its pre-project location determined in step two.

75. Subtracting the remaining project of 14 years from 30 equals 16 years.

76. Multiplying 16 years by the erosion rate of -7 ft/yr equals 112 feet, which means that the 30-year erosion line is located 112 feet landward of the pre-project SHWL (or 152 feet landward of the SBHTL).

77. That line is not depicted on any of the exhibits, but it roughly corresponds to a straight line than [sic] runs across the Property parallel to the SBHTL just landward of the "conc. pad" and "existing

conc. Pile caps (typ)" shown on Petitioner's Exhibit 37. The line is 25 to 30 feet seaward of Mr. Foster's 30-year erosion projection depicted on that exhibit.

(3) Ultimate Finding Regarding the Location of the Proposed Structures in Relation to the 30-year Erosion Projection

78. The Project includes major structures seaward of the 30-year erosion projection, as determined above.

C. Impacts of the Project on the Beach-Dune System

79. The Project includes 17 luxury town home units in two four-story buildings, a pool and spa, landscaping, and an elevated dune walkover. The units will range from 2,700 to 4,400 square feet of living space and are projected to be offered for sale in the $1.5 to $2.5 million range.

80. Beach Group's principal, Harold Seltzer, testified that the Project is sited as far landward as possible to allow for the development of all 17 units while still complying with the local setback and height restrictions; that the Project's financial viability depends upon it being developed as proposed; and that the Project cannot be redesigned and remain financially viable.

81. The CCCL permit application included a letter from the City of Ft. Pierce confirming that the Project is consistent with the applicable local development

codes. Mr. Seltzer testified that the Project's local development approvals expired in September 2006 because the CCCL permit had not been issued, and that Beach Group is having to go back through the local permitting process.

82. The seaward extent of the Project is the 1978 CCCL, which is approximately 250 feet seaward of the current CCCL.

83. The buildings on the adjacent properties are also located on the 1978 CCCL. The Project does not extend further seaward than the nearby development, including the structures authorized by the Department in File Nos. SL-162 and SL-173.[10]

84. The seaward boundary of the Property is the SBHTL. That line is approximately 295 feet landward of the MHWL established in June 2005, and as noted above, it is approximately 65 feet landward of the ECL established in 1997.

85. The adjacent properties are developed with multi-story residential buildings. There is a densely vegetated dune feature in front of the building to the south of the Property. There is some vegetation, but no discernable dune in front of the building to the north of the Property.

86. The Property as a whole is sparsely vegetated, but there are areas of "prolific vegetation" on the Property.

87. The seaward extent of the vegetation on the Property roughly corresponds to the location of the

1978 CCCL. There are several mature sea grape clusters in the vicinity of that line.

88. The beach in front of the Property is devoid of vegetation. It has a steep slope immediately landward of the water line; a wide (approximately 270 feet) expanse of relatively flat beach; and a gently sloping dune feature that starts just landward of the Property's seaward boundary, crests approximately 30 feet farther landward, and then gradually slopes downward across the Property all of the way to State Road A1A.

89. The dune feature on the Property is the frontal dune. It is the first mound sand located landward of the beach that has sufficient vegetation, height, continuity, and configuration to offer protective value.

90. The crest of the frontal dune is seaward of the vegetation line on the Property, and ranges in height from +9.7 to +12.2 feet NAVD.[11] The seaward toe of the dune is shown on the topographic survey for the Property at elevations ranging from +7.27 to +7.85 feet NAVD. Similar elevations occur on the landward side of the dune crest, just landward of the 1978 CCCL.

91. The vegetation on the Property extends landward of the 1978 CCCL and landward of the line shown on the topographic survey of the Property as the "approximate location of sparse grass and ground cover." The landward extent of the vegetation does not in and of itself define the landward extent of the dune;

changes in the slope of the ground must also be considered.

92. The more persuasive evidence establishes that the landward toe of the frontal dune is landward of the 1978 CCCL, but not as far landward as suggested by Department witness Tony McNeal.[12] The landward toe of the dune on the Property is best defined by the elevations landward of the dune crest similar to the elevations shown for the seaward toe of the dune.

93. The Project extends into the frontal dune on the Property, and it will requires [sic] minor excavation of the frontal dune, primarily in the area of the proposed pool.

94. All aspects of the project, except for the proposed dune walkover, will be landward of the crest of the frontal dune and the mature sea grape clusters located on the dune.

95. There will be no net excavation on the Property as a result of the Project. The sand excavated for the pool will be placed on-site, and additional beach-compatible sand will be used as fill for the site. Overall, the Project will result in the net placement of approximately 66 cubic yards of sand on the Property.

96. The proposed structures will be elevated on piles, which will allow the beach-dune system to fluctuate under the structures during storm events. The finished floor elevation of the proposed structures is approximately +8 feet NAVD, which is slightly higher

than the elevations associated with the toes of the frontal dune.

97. The Project will not destabilize the frontal dune, even though it will encroach into the dune.

98. The impacts of the Project on the beach-dune system will be mitigated by the placement of additional sand into the beach-dune system, as described above.

99. The Project's impacts will be further mitigated by the enhancements to the frontal dune described in the permit application.

100. Mr. Walther testified that the frontal dune on the Property could "very easily" be enhanced to be of comparable height and magnitude of the dunes on the adjacent properties.

101. The permit application proposes enhancements to the frontal dune as part of the Site Landscaping Plan for the Project. The proposed enhancements include increasing the crest of the dune to a height of +15 feet NAVD, and extensive planting of the dune with sea grapes, beach morning glories, and sea oats. The plantings would extend from the 1978 CCCL to the seaward toe of the existing frontal dune.

102. The dune enhancements proposed in the permit application should be included as a specific condition of the CCCL permit for the Project, if it is approved.

CONCLUSIONS OF LAW

103. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

104. Beach Group has the burden to prove by a preponderance of the evidence that its permit application should be approved. *See Dept. of Transportation v. J.W.C. Co., Inc.*, 396 So. 2d 778, 788-89 (Fla. 1st DCA 1981).

105. The Department's interpretation of the statutes and rules governing the issuance of CCCL permits is entitled to deference. *See, e.g.*, *Dept. of Environmental Reg. v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985) ("Courts should accord great deference to administrative interpretations of statutes which the administrative agency is required to enforce.").

106. Generally, all construction seaward of the CCCL requires a permit from the Department, unless an exemption applies. *See* § 161.053, Fla. Stat.; *Atlantis at Perdido Ass'n v. Warner*, 932 So. 2d 1206 (Fla. 1st DCA 2006). No exemption applies in this case.

107. The Department may not issue a CCCL permit for major structures seaward of the 30-year erosion projection, except in limited circumstances not applicable in this case. *See* § 163.053(6)(b), Fla. Stat.

108. Florida Administrative Code Rule 62B-33.024 establishes the procedure for determining the location of the 30-year erosion projection. The rule provides in pertinent part:

(1) A 30-year erosion projection is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-year erosion projection of the seasonal high water line (SHWL) shall be made by the Department on a site specific basis upon receipt of an application with the required topographic survey . . . for any activity affected by the requirements of Section 161.053(6), F.S. An applicant may submit a proposed 30-year erosion projection for a property, certified by a professional engineer licensed in the state of Florida, to the Department for consideration.

(2) A 30-year erosion projection shall be determined using one or more of the following procedures:

(a) An average annual shoreline change rate in the location of the mean high water line (MHWL) at a Department reference survey monument shall be determined and multiplied by 30 years. The resulting distance shall be added landward of the SHWL located on the application survey. The rate shall be determined as follows:

1. The shoreline change rate shall be derived from historical shoreline data obtained from coastal topographic surveys and maps, controlled aerial photography, and similar sources approved by the Department. Data from periods of time that clearly do not represent current prevailing coastal processes

acting on or likely to act on the site shall not be used.

2. The shoreline change rate shall include the zone spanned by three adjacent Department reference monuments on each side of the site. A lesser or greater number of reference monuments can be used as necessary to obtain a rate representative of the site, and a rationale for such use shall be provided.

3. In areas that the Department determines to be either stable or accreting, a minus one-foot per year shoreline change rate shall be applied as a conservative estimate.

* * *

(d) Beach nourishment or restoration projects shall be considered as follows:

1. Future beach nourishment or restoration projects shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted.

2. Existing beach nourishment or restoration projects shall be considered to be either a one-time beach construction event or a long-term series of related sand placement events along a given length of shoreline. The Department shall make a determination of remaining project life based on the project history, the likelihood of continuing nourishments, the funding arrangements, and consistency with the Strategic Beach Management Plan adopted by the Department for managing the

state's critically eroded shoreline and the related coastal system.

3. The MHWL to SHWL distance landward of the erosion control line (ECL) shall be determined. If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL. The pre-project SHWL shall be located by adding the MHWL to the SHWL distance landward of the pre-project MHWL (usually the ECL). The remaining project life, which is the number of years the restored beach MHWL is expected to be seaward of the ECL, shall be subtracted from the 30 years as a credit for the nourishment project. The non-credited remaining years times the pre-project shoreline change rate for the site yields the 30-year projection distance landward of the pre-project SHWL.

4. If the Department is unable to scientifically determine a pre-project erosion rate due to a lack of pre-project data, the Department shall set the 30-year erosion projection along an existing, reasonably continuous, and uniform line of construction that has been shown to be not unduly affected by erosion.

109. Beach Group argues in its PRO (at paragraph 58.d) that, for purposes of applying this rule methodology, the "remaining project life" applicable to this case

is likely to exceed 30 years, given the history of beach renourishment in this area since

> 1971, the likelihood of continuing renourishments, including a request by St. Lucie County to extend the life of the nourishment project (and the unlikelihood that state, federal and local governments will allow this and other similarly situated structures to simply fall into the Atlantic Ocean), funding arrangements, and nourishment project's undisputed consistency with the Strategic Beach Management Plan and the Fort Pierce Inlet Management Plan.

110. There is some appeal to this argument, particularly since it is reasonable to expect that beach nourishment south of the inlet will continue for the foreseeable future. However, the potential for continued nourishments beyond the term of the "existing" project is not appropriate for consideration under Florida Administrative Code Rule 62B-33.024. *See also* 161.053(6)(d), Fla. Stat.

111. The "existing" project includes future nourishment projects only if "all funding arrangements have been made and all permits have been issued at the time the application is submitted." Fla. Admin. Code R. 62B-33.024(2)(d)1. Potential (or even likely) future nourishment projects other than one authorized by Congress through 2021 do not meet that standard.[13]

112. The factors listed in Florida Administrative Code Rule 62B-33.024(2)(d)2. relating to the Department's determination of remaining project life necessarily relate to "existing" projects, as defined in Subparagraph (2)(d)1. of the rule. Indeed, it would

be illogical – and, arguably, contrary to Section 161.053(6)(d), Florida Statutes – to construe Subparagraph (2)(d)2. of the rule to allow for consideration of projects that would not be considered to be "existing" under Subparagraph (2)(d)1. of the rule.

113. The more persuasive evidence establishes that the Project extends seaward of the 30-year erosion projection. *See* Findings of Fact, Part B. Therefore, the Department may not issue a CCCL permit for the Project. *See* § 161.053(6) (b), Fla. Stat.

114. In light of this conclusion, it is not necessary to determine whether the Project otherwise satisfies the applicable CCCL permitting requirements. However, the issue will be addressed below in an abundance of caution in the event that the Department or an appellate court rejects the conclusion that the Project is located seaward of the 30-year erosion projection.

115. The Department is authorized to issue permits for construction seaward of the CCCL if the permit is "clearly justified" based upon the consideration of facts and circumstances, including the potential impacts of the proposed construction on the beach-dune system. *See* § 161.053(5) (a)3. Fla. Stat.

116. The general criteria governing approval of a CCCL permit are set forth in Florida Administrative Code 62B-33.005. The rule requires the applicant to "provide the Department with sufficient information pertaining to the proposed project to show that any impacts associated with the construction have been

minimized and that the construction will not result in a significant adverse impact." Fla. Admin. Code R. 62B-33.005(2).

117. It is undisputed that the Project will not result in a "significant adverse impact," which is defined as an adverse impact of such magnitude that it may alter the coastal system by measurably affecting the existing shoreline change rate; significantly interfering with its ability to recover from a coastal storm; or disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered. *See* Fla. Admin. Code R. 62B-33.002(31)(b).

118. At issue is whether the Project will cause "adverse impacts" to the beach-dune system and, if so, whether those impacts have been minimized. Adverse impacts are impacts to the coastal system that may cause a measurable interference with he natural functioning of the system. *See* Fla. Admin. Code R. 62B-33.002(31)(a).

119. Florida Administrative Code Rule 62B-33.005(3)(b) requires "siting and design criteria that minimize adverse and other impacts and . . . mitigation of adverse impacts." The Deparment [sic] contends that the Project fails to meet the requirements of this rule because the Project will be located on the frontal dune, not landward of the dune.

120. For the same reason, the Department contends that the Project fails to meet the requirements

of Florida Administrative Code Rule 62B-33.005(8), which requires major structures to be "located a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion."

121. It is undisputed that the Project satisfies the permitting criteria in Florida Administrative Code Rule 62B-33.005, except for those in paragraph (3)(b) and subsection (8).

122. The frontal dune is "the first natural or manmade mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value." § 161.053(6)(a)1., Fla. Stat. It is undisputed that the Project encroaches into frontal dune, but that it is behind the crest of the dune.

123. The only express statutory or rule prohibition against construction on a frontal dune is in the limited circumstance where construction of a single-family dwelling is permitted seaward of the 30-year erosion projection. *See* § 161.053(6)(c)3.-4., Fla. Stat. (requiring the dwelling to be located "landward of the frontal dune structure" and "as far landward . . . as practicable without being located seaward of or on the frontal dune").

124. There is no express statutory prohibition against construction on a frontal dune landward of the

30-year erosion projection, so long as the proposed construction does not destabilize the frontal dune or otherwise adversely impact the beach-dune system. *See, e.g.*, *Young v. Dept. of Environmental Protection*, 2005 Fla. ENV LEXIS 155, at ¶¶ 83, 111 (DOAH Aug. 15, 2005), *adopted in toto*, 2005 Fla. ENV LEXIS 154 (DEP Sep. 26, 2005), *aff'd per curiam*, 937 So. 2d 133 (Fla. 2nd DCA 2006) (table).

125. Florida Administrative Code Rule 62B-33.005(8) does not expressly prohibit construction that encroaches into a frontal dune; it only requires that major structures be located a "sufficient distance landward of the . . . frontal dune to permit natural shoreline fluctations [sic], to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion." Where, as here, the more persuasive evidence establishes that the location of the proposed structures on the landward side of the crest of the frontal dune will not destabilize the dune or otherwise adversely affect the beach-dune system, the purpose of the rule is satisfied. *See Young*, *supra.*

126. The stability of the beach-dune system in the vicinity of the Property is dependent upon the continuing renourishment efforts; the contribution of the frontal dune on the Property to the stability of the beach-dune system or the protection of upland properties is relatively minor in comparison. As a result, the slight encroachment of the Project into the landward side of the frontal dune will not have a material impact on the natural functioning of the beach-dune system or

the ability of the system to recover following storm-induced erosion.

127. The impacts to the frontal dune will be limited to minor excavations and the removal of existing dune vegetation in areas behind the crest of the dune. Those impacts will not destabilize the frontal dune or materially affect the ability of the dune or the beach-dune system to recover from storm events, and the impacts have been adequately mitigated through the placement of additional sand in the beach-dune system and the proposed enhancements to the frontal dune.

128. In sum, if it is determined contrary to the conclusion above that the Project is landward of the 30-year erosion projection, the permit should be approved because the more persuasive evidence establishes that the Project satisfies the applicable criteria in Florida Administrative Code Rule 62B-33.005.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order denying Beach Group's application for a CCCL permit.

DONE AND ENTERED this 19th day of April, 2007, in Tallahassee, Leon County, Florida.

/s/ T. Kent Wetherell, II
T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

ENDNOTES

[1]/ All statutory references in this Recommended Order are to the 2006 version of the Florida Statutes.

[2]/ Findings 1 through 14 are based upon the stipulations in the Joint Pre-hearing Stipulation. Findings 15 and 16 are based upon stipulations at the final hearing. *See* Tr. 102-03, 191-97.

[3]/ The ECL represents the boundary between the sovereignty lands of the state and the adjacent upland properties. *See* § 161.151(3), Fla. Stat. An ECL is to be established prior to a beach restoration project in order to define the ownership of the beach created by the project. *See* § 161.141, Fla. Stat. The new beach created seaward of the ECL is state property; any new beach created landward of the ECL is private property subject to a public easement across the property. *See* §§ 161.141, 161.191, Fla. Stat. *But cf. Save Our Beaches, Inc. v. Dept. of Environmental Protection*, 31 Fla. L. Weekly D1173 (Fla. 1st DCA Apr. 28, 2006) (holding that the establishment of an ECL as part of a beach renourishment project results in an unconstitutional taking of the upland property owners' riparian rights), *question certified*, 31 Fla. L. Weekly D1811 (Fla. 1st DCA July 3, 2006), *rev. granted*, 937 So. 2d 1099 (Fla. 2006).

[4]/ *See, e.g.*, Pet. Ex. 24 (File Nos. SL-162 and SL-173); Pet. Ex. 25 (File No. SL-200).

[5]/ These distances are based upon the scale shown on Department Exhibit 6, which is more accurate that [sic] Mr. Foster's testimony that the distances between MHWL and SHWL, as surveyed in March 2002, was "*about* 40 to 60 feet." Tr. 290 (emphasis supplied).

[6]/ *See* Pet. Ex. 24 (memo dated April 9, 1999, attached to the analyses for File Nos. SL-162 and SL-173). *See also* Tr. 68 (referencing Mr. Foster's use of "a distance of some 42 feet based on historical averages" in his review of File No. SL-222).

[7]/ *See, e.g.*, Pet. Ex. 16 (Table 1), which shows an average erosion rate of -7.5 ft/yr for monuments R-34 to R-39 over the period of 1949-68. *Accord* Tr. 291-92.

[8]/ *See* Pet. Ex. 25 (File No. SL-200).

[9]/ *See* Pet. Ex. 16 (Table 1), which reflects that the erosion rates for monuments R-34 and R-35 were -0.1 and -0.5 ft/yr, respectively, for the period of 1930-49, as compared to -10.3 and -6.7 ft/yr, respectively, for the period of 1949-68.

[10]/ *See, e.g.*, Pet. Ex. 24; Dept. Ex. 6. Beach Group points out that the structures authorized in File Nos. SL-162 and SL-173 were found to be landward of the 30-year erosion projection calculated by the Department. However, the "remaining project life" was longer when those permit applications were filed – in 1999 and 2000, respectively – and, as a result, the historical erosion rate was applied to a smaller number of years in calculating the landward migration of the SHWL in those cases. Indeed, as Mr. Foster pointed out in his review of those applications, the 30-year erosion projection is "time sensitive" and "must be adjusted in the future for diminishing credit for the renourishment project." Pet. Ex. 24 (memorandum dated April 9, 1999, attached to analyses for File Nos. SL-162 and SL-173).

[11]/ NAVD is the North American Vertical Datum of 1988. *See* Fla. Admin. Code R. 61B-33.002(37). Elevations shown on the topographic survey for the Property are reflected in relation to the NAVD. *See* Pet. Ex. 19 (note 11).

[12]/ Mr. McNeal opined that the landward toe of the frontal dune was located 20 feet or more landward of the 1978 CCCL. *See* Tr. 203, 207-10, 229-33. *See also* Dept. Ex. 24N (highlighted lines). The opinion that the encroachment was more than 20 feet was in the form of a proffer because it was a new opinion not disclosed by the Department prior to the final hearing. *See* Tr. 205-06. The exclusion of Mr. McNeal's opinion regarding the landward extent of the frontal dune (and the resulting larger encroachment of the project into the dune) is immaterial to Mr. McNeal's ultimate opinion that the project fails to meet the applicable regulatory requirements because he understands the Department's rules to prohibit development that encroaches into the frontal dune at all. *See* Tr. 223.

[13]/ The likelihood of continued beach nourishment south of the inlet for the foreseeable future might be appropriate for consideration in the context of a request for a variance or waiver under Section 120.542, Florida Statutes. *See* Pet. Ex. 21 (identifying a variance as a possible means for the Project to be approved as it is currently proposed). A variance or waiver must be pursued through a separate proceeding.

Supreme Court of Florida

THURSDAY, MARCH 30, 2017

CASE NO.: SC16-2084
Lower Tribunal No(s).:
4D14-3307;
562011CA000702AXXXHC

BEACH GROUP INVESTMENTS, LLC.	vs.	FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V. Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

PARIENTE, LEWIS, QUINCE, and CANADY, JJ., concur.

LABARGA, C.J., would grant oral argument.

A True Copy
Test:

/s/ John A. Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

two
Served:

PHILIP M. BURLINGTON
DAVID SMOLKER
ETHAN JEROME LOEB
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JON P. TASSO
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CHRISTINA MARIE MARTIN
CHRISTINA CARLSON DODDS
HON. LONN WEISSBLUM, CLERK
HON. DWIGHT LUTHER GEIGER, JUDGE
DANIEL W. BISHOP, III
HON. JOSEPH E. SMITH, CLERK

The 2006 Florida Statutes

Title X PUBLIC OFFICERS, EMPLOYEES, AND RECORD	Chapter 120 ADMINISTRATIVE PROCEDURE ACT	View Entire Chapter

120.542 Variances and waivers. –

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the

appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall include procedures for the granting, denying, or revoking of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies

of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is requested.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place

and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(9) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

History. – s. 12, ch. 96-159; s. 5, ch. 97-176.

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161.053 Coastal construction and excavation; regulation on county basis. –

(1)(a) The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access. In furtherance of these findings, it is the intent of the Legislature to provide that the department establish coastal construction control lines on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida. Such lines shall be established so as to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable

weather conditions. However, the department may establish a segment or segments of a coastal construction control line further landward than the impact zone of a 100-year storm surge, provided such segment or segments do not extend beyond the landward toe of the coastal barrier dune structure that intercepts the 100-year storm surge. Such segment or segments shall not be established if adequate dune protection is provided by a state-approved dune management plan. Special siting and design considerations shall be necessary seaward of established coastal construction control lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access.

(b) As used in this subsection:

1. When establishing coastal construction control lines as provided in this section, the definition of "sand beach" shall be expanded to include coastal barrier island ends contiguous to the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida.

2. "Coastal barrier island ends" means those areas on the ends of barrier islands fronting the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, which are subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions.

3. "Coastal barrier islands" means geological features which are completely surrounded by marine waters that front upon the open waters of the Atlantic

Ocean, the Gulf of Mexico, or the Straits of Florida and are composed of quartz sands, clays, limestone, oolites, rock, coral, coquina, sediment, or other material, including spoil disposal, which features lie above the line of mean high water. Mainland areas which were separated from the mainland by artificial channelization for the purpose of assisting marine commerce shall not be considered coastal barrier islands.

(c) Coastal construction control lines shall be set on coastal barrier island ends only in conjunction with the resetting of the coastal construction control line throughout the entire county within which the barrier island end is located, and shall not be established on reaches of coastal barrier island ends where the shore is vegetated with mangroves.

(2)(a) Coastal construction control lines shall be established by the department only after it has been determined from a comprehensive engineering study and topographic survey that the establishment of such control lines is necessary for the protection of upland properties and the control of beach erosion. No such line shall be set until a public hearing has been held in each affected county. After the department has given consideration to the results of such public hearing, it shall, after considering ground elevations in relation to historical storm and hurricane tides, predicted maximum wave uprush, beach and offshore ground contours, the vegetation line, erosion trends, the dune or bluff line, if any exist, and existing upland development, set and establish a coastal construction control line and cause such line to be duly filed in the public records of any

county affected and shall furnish the clerk of the circuit court in each county affected a survey of such line with references made to permanently installed monuments at such intervals and locations as may be considered necessary. However, no coastal construction control line shall be set until a public hearing has been held by the department and the affected persons have an opportunity to appear. The hearing shall constitute a public hearing and shall satisfy all requirements for a public hearing pursuant to s. 120.54(3). The hearing shall be noticed in the Florida Administrative Weekly in the same manner as a rule. Any coastal construction control line adopted pursuant to this section shall not be subject to a s. 120.56(2) rule challenge or a s. 120.54(3)(c)2. drawout proceeding, but, once adopted, shall be subject to a s. 120.56(3) invalidity challenge. The rule shall be adopted by the department and shall become effective upon filing with the Department of State, notwithstanding the provisions of s. 120.54(3)(e)6. Upon such filing with the Department of State, no person, firm, corporation, or governmental agency shall construct any structure whatsoever seaward thereof; make any excavation, remove any beach material, or otherwise alter existing ground elevations; drive any vehicle on, over, or across any sand dune; or damage or cause to be damaged such sand dune or the vegetation growing thereon seaward thereof, except as hereinafter provided. Control lines established under the provisions of this section shall be subject to review at the discretion of the department after consideration of hydrographic and topographic data that indicate

shoreline changes that render established coastal construction control lines to be ineffective for the purposes of this act or at the written request of officials of affected counties or municipalities. Any riparian upland owner who feels that such line as established is unduly restrictive or prevents a legitimate use of the owner's property shall be granted a review of the line upon written request. After such review, the department shall decide if a change in the control line as established is justified and shall so notify the person or persons making the request. The decision of the department shall be subject to judicial review as provided in chapter 120.

(b)1. The department shall exempt construction proposed for a location seaward of a coastal construction control line and landward of existing armoring from certain siting and design criteria of this chapter, provided the armoring is capable of protecting the proposed construction from the effects of erosion from a 100-year storm surge. The exemption shall apply to proposed structures involving the foundation, siting, and excavation criteria of this section, except such structures shall be:

a. Sited a sufficient distance landward of the armoring to allow for maintenance of the armoring.

b. Located up to or landward of the established line of construction.

c. Designed to comply with the windload requirements of this section.

d. Sited and designed to protect marine turtles.

2. The applicant shall provide scientific and engineering evidence that the armoring has been designed, constructed, and maintained to survive the effects of the design storm and provide protection to existing and proposed structures from the erosion associated with that event. Evidence shall include a report with data and supporting analysis, and shall be certified by a professional engineer registered in this state, that the armoring was designed and constructed and is in adequate condition to meet the following criteria:

a. The top must be at or above the still water level, including setup, for the design storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination, and must be high enough to preclude runup overtopping.

b. The armoring must be stable under the design storm including maximum localized scour, with adequate penetration and toe protection to avoid settlement, toe failure, or loss of material from beneath or behind the armoring.

c. The armoring must have sufficient continuity or return walls to prevent flanking under the design storm from impacting the proposed construction.

d. The armoring must withstand the static and hydrodynamic forces of the design storm.

(3) It is the intent of the Legislature that any coastal construction control line that has not been updated

since June 30, 1980, shall be considered a critical priority for reestablishment by the department. In keeping with this intent, the department shall notify the Legislature if all such lines cannot be reestablished by December 31, 1997, so that the Legislature may subsequently consider interim lines of jurisdiction for the remaining counties.

(4) Any coastal county or coastal municipality may establish coastal construction zoning and building codes in lieu of the provisions of this section, provided such zones and codes are approved by the department as being adequate to preserve and protect the beaches and coastal barrier dunes adjacent to such beaches which are under the jurisdiction of the department from imprudent construction that will jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access. Exceptions to locally established coastal construction zoning and building codes shall not be granted unless previously approved by the department. It is the intent of this subsection to provide for local administration of established coastal construction control lines through approved zoning and building codes where desired by local interests and where such local interests have, in the judgment of the department, sufficient funds and personnel to adequately administer the program. Should the department determine at any time that the program is inadequately administered, the department shall have

authority to revoke the authority granted to the county or municipality.

(5) Except in those areas where local zoning and building codes have been established pursuant to subsection (4), a permit to alter, excavate, or construct on property seaward of established coastal construction control lines may be granted by the department as follows:

(a) The department may authorize an excavation or erection of a structure at any coastal location as described in subsection (1) upon receipt of an application from a property and/or riparian owner and upon the consideration of facts and circumstances, including:

1. Adequate engineering data concerning shoreline stability and storm tides related to shoreline topography;

2. Design features of the proposed structures or activities; and

3. Potential impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system, which, in the opinion of the department, clearly justify such a permit.

(b) If in the immediate contiguous or adjacent area a number of existing structures have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing, and if the existing structures have not been unduly affected by erosion, a proposed structure may, at the

discretion of the department, be permitted along such line on written authorization from the department if such structure is also approved by the department. However, the department shall not contravene setback requirements or zoning or building codes established by a county or municipality which are equal to, or more strict than, those requirements provided herein. This paragraph does not prohibit the department from requiring structures to meet design and siting criteria established in paragraph (a) or in subsection (1) or subsection (2).

(c) The department may condition the nature, timing, and sequence of construction of permitted activities to provide protection to nesting sea turtles and hatchlings and their habitat, pursuant to s. 370.12, and to native salt-resistant vegetation and endangered plant communities.

(d) The department may require such engineer certifications as necessary to assure the adequacy of the design and construction of permitted projects.

(e) The department shall limit the construction of structures which interfere with public access along the beach. However, the department may require, as a condition to granting permits, the provision of alternative access when interference with public access along the beach is unavoidable. The width of such alternate access may not be required to exceed the width of the access that will be obstructed as a result of the permit being granted.

(f) The department may, as a condition to the granting of a permit under this section, require mitigation, financial, or other assurances acceptable to the department as may be necessary to assure performance of conditions of a permit or enter into contractual agreements to best assure compliance with any permit conditions. The department may also require notice of the permit conditions required and the contractual agreements entered into pursuant to the provisions of this subsection to be filed in the public records of the county in which the permitted activity is located.

(6)(a) As used in this subsection:

1. "Frontal dune" means the first natural or manmade mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity, and configuration to offer protective value.

2. "Seasonal high-water line" means the line formed by the intersection of the rising shore and the elevation of 150 percent of the local mean tidal range above local mean high water.

(b) After October 1, 1985, and notwithstanding any other provision of this part, the department, or a local government to which the department has delegated permitting authority pursuant to subsections (4) and (16), shall not issue any permit for any structure, other than a coastal or shore protection structure, minor structure, or pier, meeting the requirements of this part, or other than intake and discharge structures for a facility sited pursuant to part II of chapter 403,

which is proposed for a location which, based on the department's projections of erosion in the area, will be seaward of the seasonal high-water line within 30 years after the date of application for such permit. The procedures for determining such erosion shall be established by rule. In determining the area which will be seaward of the seasonal high-water line in 30 years, the department shall not include any areas landward of a coastal construction control line.

(c) Where the application of paragraph (b) would preclude the construction of a structure, the department may issue a permit for a single-family dwelling for the parcel so long as:

1. The parcel for which the single-family dwelling is proposed was platted or subdivided by metes and bounds before the effective date of this section;

2. The owner of the parcel for which the single-family dwelling is proposed does not own another parcel immediately adjacent to and landward of the parcel for which the dwelling is proposed;

3. The proposed single-family dwelling is located landward of the frontal dune structure; and

4. The proposed single-family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune.

(d) In determining the land areas which will be below the seasonal high-water line within 30 years after the permit application date, the department shall consider the impact on the erosion rates of an existing beach

nourishment or restoration project or of a beach nourishment or restoration project for which all funding arrangements have been made and all permits have been issued at the time the application is submitted. The department shall consider each year there is sand seaward of the erosion control line that no erosion took place that year. However, the seaward extent of the beach nourishment or restoration project beyond the erosion control line shall not be considered in determining the applicable erosion rates. Nothing in this subsection shall prohibit the department from requiring structures to meet criteria established in subsection (1), subsection (2), or subsection (5) or to be further landward than required by this subsection based on the criteria established in subsection (1), subsection (2), or subsection (5).

(e) The department shall annually report to the Legislature the status of this program, including any changes to the previously adopted procedures for determining erosion projections.

(7) Any coastal structure erected, or excavation created, in violation of the provisions of this section is hereby declared to be a public nuisance; and such structure shall be forthwith removed or such excavation shall be forthwith refilled after written notice by the department directing such removal or filling. In the event the structure is not removed or the excavation refilled within a reasonable time as directed, the department may remove such structure or fill such excavation at its own expense; and the costs thereof shall become a lien upon the property of the upland owner

upon which such unauthorized structure or excavation is located.

(8) Any person, firm, corporation, or agent thereof who violates this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083; except that a person driving any vehicle on, over, or across any sand dune and damaging or causing to be damaged such sand dune or the vegetation growing thereon in violation of this section is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person, firm, corporation, or agent thereof shall be deemed guilty of a separate offense for each day during any portion of which any violation of this section is committed or continued.

(9) The provisions of this section do not apply to structures intended for shore protection purposes which are regulated by s. 161.041 or to structures existing or under construction prior to the establishment of the coastal construction control line as provided herein, provided such structures may not be materially altered except as provided in subsection (5). Except for structures that have been materially altered, structures determined to be under construction at the time of the establishment or reestablishment of the coastal construction control line shall be exempt from the provisions of this section. However, unless such an exemption has been judicially confirmed to exist prior to April 10, 1992, the exemption shall last only for a period of 3 years from either the date of the determination of the exemption or April 10, 1992, whichever occurs later.

The department may extend the exemption period for structures that require longer periods for completion of their construction, provided that construction during the initial exemption period has been continuous. For purposes of this subsection, "continuous" means following a reasonable sequence of construction without significant or unreasonable periods of work stoppage.

(10) The department may by regulation exempt specifically described portions of the coastline from the provisions of this section when in its judgment such portions of coastline because of their nature are not subject to erosion of a substantially damaging effect to the public.

(11) Pending the establishment of coastal construction control lines as provided herein, the provisions of s. 161.052 shall remain in force. However, upon the establishment of coastal construction control lines, or the establishment of coastal construction zoning and building codes as provided in subsection (4), the provisions of s. 161.052 shall be superseded by the provisions of this section.

(12)(a) The coastal construction control requirements defined in subsection (1) and the requirements of the erosion projections pursuant to subsection (6) do not apply to any modification, maintenance, or repair to any existing structure within the limits of the existing foundation which does not require, involve, or include any additions to, or repair or modification of, the existing foundation of that structure. Specifically excluded

from this exemption are seawalls or other rigid coastal or shore protection structures and any additions or enclosures added, constructed, or installed below the first dwelling floor or lowest deck of the existing structure.

(b) Activities seaward of the coastal construction control line which are determined by the department not to cause a measurable interference with the natural functioning of the coastal system are exempt from the requirements in subsection (5).

(c) The department may establish exemptions from the requirements of this section for minor activities determined by the department not to have adverse impacts on the coastal system. Examples of such activities include, but are not limited to:

1. Boat moorings;

2. Maintenance of existing beach/dune vegetation;

3. The burial of seaweed, dead fish, whales, or other marine animals on the unvegetated beach;

4. The removal of piers or other derelict structures from the unvegetated beach or seaward of mean high water;

5. Temporary emergency vehicular access, provided any impacted area is immediately restored;

6. The removal of any existing structures or debris from the upland, provided there is no excavation or disturbance to the existing topography or beach/dune vegetation;

7. Construction of any new roof overhang extending no more than 4 feet beyond the confines of the existing foundation during modification, renovation, or reconstruction of a habitable structure within the confines of the existing foundation of that structure which does not include any additions to or modification of the existing foundation of that structure;

8. Minor and temporary excavation for the purpose of repairs to existing subgrade residential service utilities (e.g., water and sewer lines, septic tanks and drainfields, electrical and telephone cables, and gas lines), provided that there is minimal disturbance and that grade is restored with fill compatible in both coloration and grain size to the onsite material and any damaged or destroyed vegetation is restored using similar vegetation; and

9. Any other minor construction with impacts similar to the above activities.

(13)(a) Notwithstanding the coastal construction control requirements defined in subsection (1) or the erosion projection determined pursuant to subsection (6), the department may, at its discretion, issue a permit for the repair or rebuilding within the confines of the original foundation of a major structure pursuant to the provisions of subsection (5). Alternatively, the department may also, at its discretion, issue a permit for a more landward relocation or rebuilding of a damaged or existing structure if such relocation or rebuilding would not cause further harm to the beach-dune

system, and if, in the case of rebuilding, such rebuilding complies with the provisions of subsection (5), and otherwise complies with the provisions of this subsection.

(b) Under no circumstances shall the department permit such repairs or rebuilding that expand the capacity of the original structure seaward of the 30-year erosion projection established pursuant to subsection (6).

(c) In reviewing applications for relocation or rebuilding, the department shall specifically consider changes in shoreline conditions, the availability of other relocation or rebuilding options, and the design adequacy of the project sought to be rebuilt.

(d) Permits issued under this subsection shall not be considered precedential as to the issuance of subsequent permits.

(14) Concurrent with the establishment of a coastal construction control line and the ongoing administration of this chapter, the secretary of the department shall make recommendations to the Board of Trustees of the Internal Improvement Trust Fund concerning the purchase of the fee or any lesser interest in any lands seaward of the control line pursuant to the state's Save Our Coast, Conservation and Recreation Lands, or Outdoor Recreation Land acquisition programs; and, with respect to those control lines established pursuant to this section prior to June 14, 1978, the secretary may make such recommendations.

(15) A coastal county or municipality fronting on the Gulf of Mexico, the Atlantic Ocean, or the Straits of Florida shall advise the department within 5 days after receipt of any permit application for construction or other activities proposed to be located seaward of the line established by the department pursuant to the provisions of this section. Within 5 days after receipt of such application, the county or municipality shall notify the applicant of the requirements for state permits.

(16) In keeping with the intent of subsection (4), and at the discretion of the department, authority for permitting certain types of activities which have been defined by the department may be delegated by the department to a coastal county or coastal municipality. Such partial delegation shall be narrowly construed to those particular activities specifically named in the delegation and agreed to by the affected county or municipality, and the delegation may be revoked by the department at any time if it is determined that the delegation is improperly or inadequately administered.

(17) The department may, at the request of a property owner, contract with such property owner for an agreement, or modify an existing contractual agreement regulating development activities landward of a coastal construction control line, provided that nothing within the contractual agreement shall be inconsistent with the design and siting provisions of this section. In no case shall the contractual agreement bind either party for a period longer than 5 years from its date of execution. Prior to beginning any construction activity

covered by the agreement, the property owner shall obtain the necessary authorization required by the agreement. The agreement shall not authorize construction for:

(a) Major habitable structures which would require construction beyond the expiration of the agreement, unless such construction is above the completed foundation; or

(b) Nonhabitable major structures or minor structures, unless such construction was authorized at the same time as the habitable major structure.

(18) The department is authorized to grant areawide permits to local governments, other governmental agencies, and utility companies for special classes of activities in areas under their general jurisdiction or responsibility, so long as these activities, due to the type, size, or temporary nature of the activity, will not cause measurable interference with the natural functioning of the beach dune system or with marine turtles or their nesting sites. Such activities shall include, but not be limited to: road repairs, not including new construction; utility repairs and replacements, or other minor activities necessary to provide utility services; beach cleaning; and emergency response. The department may adopt rules to establish criteria and guidelines for use by permit applicants. The department shall require notice provisions appropriate to the type and nature of the activities for which areawide permits are sought.

(19) The department is authorized to grant general permits for projects, including dune walkovers, decks, fences, landscaping, sidewalks, driveways, pool resurfacing, minor pool repairs, and other nonhabitable structures, so long as these projects, due to the type, size, or temporary nature of the project, will not cause a measurable interference with the natural functioning of the beach dune system or with marine turtles or their nesting sites. In no event shall multifamily habitable structures qualify for general permits. However, single-family habitable structures which do not advance the line of existing construction and satisfy all siting and design requirements of this section may be eligible for a general permit pursuant to this subsection. The department may adopt rules to establish criteria and guidelines for use by permit applicants.

(a) Persons wishing to use the general permits set forth in this subsection shall, at least 30 days before beginning any work, notify the department in writing on forms adopted by the department. The notice shall include a description of the proposed project and supporting documents depicting the proposed project, its location, and other pertinent information as required by rule, to demonstrate that the proposed project qualifies for the requested general permit. Persons who undertake projects without proof of notice to the department, but whose projects would otherwise qualify for general permits, shall be considered as being undertaken without a permit and shall be subject to enforcement pursuant to s. 161.121.

(b) Persons wishing to use a general permit must provide notice as required by the applicable local building code where the project will be located. If a building code requires no notice, any person wishing to use a general permit must, at a minimum, post on the property at least 5 days prior to the commencement of construction a sign no smaller than 88 square inches, with letters no smaller than one-quarter inch, describing the project.

(20)(a) The department may suspend or revoke the use of a general or areawide permit for good cause, including: submission of false or inaccurate information in the notification for use of a general or areawide permit; violation of law, department orders, or rules relating to permit conditions; deviation from the specified activity or project indicated or the conditions for undertaking the activity or project; refusal of lawful inspection; or any other act on the permittee's part in using the general or areawide permit which results or may result in harm or injury to human health or welfare, or which causes harm or injury to animal, plant, or aquatic life or to property.

(b) The department shall have access to the permitted activity or project at reasonable times to inspect and determine compliance with the permit and department rules.

(21) The department is authorized to adopt rules related to the following provisions of this section: establishment of coastal construction control lines; activities

seaward of the coastal construction control line; exemptions; property owner agreements; delegation of the program; permitting programs; and violations and penalties.

(22) In accordance with ss. 553.73 and 553.79, and upon the effective date of the Florida Building Code, the provisions of this section which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities shall be incorporated into the Florida Building Code. The Florida Building Commission shall have the authority to adopt rules pursuant to ss. 120.536 and 120.54 in order to implement those provisions. This subsection does not limit or abrogate the right and authority of the department to require permits or to adopt and enforce environmental standards, including but not limited to, standards for ensuring the protection of the beach-dune system, proposed or existing structures, adjacent properties, marine turtles, native salt-resistant vegetation, endangered plant communities, and the preservation of public beach access.

History. – s. 1, ch. 71-280; s. 2, ch. 75-87; s. 1, ch. 77-12; s. 5, ch. 78-257; s. 29, ch. 79-164; s. 3, ch. 80-183; s. 67, ch. 81-259; s. 2, ch. 83-247; s. 33, ch. 85-55; s. 1, ch. 86-191; s. 13, ch. 87-97; s. 1, ch. 88-106; s. 1, ch. 88-349; s. 11, ch. 89-175; s. 9, ch. 91-224; s. 1, ch. 92-191; s. 22, ch. 94-356; s. 1437, ch. 95-147; s. 1, ch. 96-371; s. 21, ch. 96-410; s. 2, ch. 98-131; s. 6, ch. 2000-141; s. 5, ch. 2000-346; s. 34, ch. 2001-186; s. 3, ch. 2001-372.

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161.151 Definitions; ss. 161.141-161.211. – As used in ss. 161.141-161.211:

(1) "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

(2) "Requesting authority" means any coastal county, municipality, or beach erosion control district which requests a survey by the board of trustees under the provisions of ss. 161.141-161.211.

(3) "Erosion control line" means the line determined in accordance with the provisions of ss. 161.141-161.211 which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean, the Gulf of Mexico, and the bays, lagoons and other tidal reaches thereof on the date of the recording of the survey as authorized in s. 161.181.

(4) "Authorized beach restoration project" means a beach project authorized by the United States Congress or the department which involves a specific project engineering design and a project maintenance program for a period of not less than 10 years.

History. – s. 2, ch. 70-276; s. 1, ch. 70-439; s. 2, ch. 82-144.

62B-33.005 General Criteria.

(1) The beach and dune system is an integral part of the coastal system and represents one of the most valuable natural resources in Florida, providing protection to adjacent upland properties, recreational areas, and habitat for wildlife. A coastal construction control line (CCCL) is intended to define that portion of the beach and dune system which is subject to severe fluctuations caused by a 100-year storm surge, storm waves, or other forces such as wind, wave, or water level changes. These fluctuations are a necessary part of the natural functioning of the coastal system and are essential to post-storm recovery, long term stability, and the preservation of the beach and dune system. However, imprudent human activities can adversely interfere with these natural processes and alter the integrity and functioning of the beach and dune system. The control line and 50-foot setback call attention to the special hazards and impacts associated with the use of such property, but do not preclude all development or alteration of coastal property seaward of such lines.

(2) In order to demonstrate that construction is eligible for a permit, the applicant shall provide the Department with sufficient information pertaining to the proposed project to show that adverse and other impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact.

(3) After reviewing all information required pursuant to this rule chapter, the Department shall:

(a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles. Each application shall be evaluated on its own merits in making a permit decision; therefore, a decision by the Department to grant a permit shall not constitute a commitment to permit additional similar construction within the same fixed coastal cell.

(b) Deny any application for an activity where the project has not met the Department's siting and design criteria; has not minimized adverse and other impacts, including stormwater runoff; or has not provided mitigation of adverse impacts.

(4) The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards,

guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter 161, F.S., and this rule chapter are met, including the following:

(a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;

(b) The construction will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures;

(c) The construction will not direct discharges of water or other fluids in a seaward direction and in a manner that would result in significant adverse impacts. For the purposes of this rule section, construction shall be designed so as to minimize erosion induced surface water runoff within the beach and dune system and to prevent additional seaward or offsite discharges associated with a coastal storm event.

(d) The construction will not result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback;

(e) The construction will not cause an increase in structure-induced scour of such magnitude during a

storm that the structure-induced scour would result in a significant adverse impact;

(f) The construction will minimize the potential for wind and waterborne missiles during a storm;

(g) The activity will not interfere with public access, as defined in Section 161.021, F.S.; and

(h) The construction will not cause a significant adverse impact to marine turtles, or the coastal system.

(5) In order for a manmade frontal dune to be considered as a frontal dune defined under Section 161.053(5)(a)1., F.S., the manmade frontal dune shall be constructed to meet or exceed the protective value afforded by the natural frontal dune system in the immediate area of the subject shoreline. Prior to the issuance of a permit for a single-family dwelling meeting the criteria of Section 161.053(5)(c), F.S., the manmade frontal dune must be maintained for a minimum of 12 months and be demonstrated to be as stable and sustainable as the natural frontal dune system.

(6) Sandy material excavated seaward of the control line or 50-foot setback shall be maintained on site seaward of the control line or 50-foot setback and be placed in the immediate area of construction unless otherwise specifically authorized by the Department.

(7) Swimming pools, wading pools, waterfalls, spas, or similar type water structures are expendable structures and shall be sited so that their failure does

not have adverse impact on the beach and dune system, any adjoining major structures, or any coastal protection structure. Pools sited within close proximity to a significant dune shall be elevated either partially or totally above the original grade to minimize excavation and shall not cause a net loss of material from the immediate area of the pool. All pools shall be designed to minimize any permanent excavation seaward of the CCCL.

(8) Major structures shall be located a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability, and to allow natural recovery to occur following storm-induced erosion. Where a rigid coastal structure exists, proposed major structures shall be located a sufficient distance landward of the rigid coastal structure to allow for future maintenance or repair of the rigid coastal structure. Although fishing piers shall be exempt from this provision, their foundation piles shall be located so as to allow for the maintenance and repair of any rigid coastal structure that is located in close proximity to the pier.

(9) If in the immediate area a number of existing major structures have established a reasonably continuous and uniform construction line and if the existing structures have not been unduly affected by erosion, except where not allowed by the requirements of Section 161.053(5), F.S., and this rule chapter, the Department shall issue a permit for the construction of a similar structure up to that line.

(10) In considering applications for single-family dwellings proposed to be located seaward of the 30-year erosion projection pursuant to Section 161.053(5), F.S., the Department shall require structures to meet criteria in Section 161.053(5)(c), F.S., and all other siting and design criteria established in this rule chapter.

(11) In considering project impacts to native salt-tolerant vegetation, the Department shall evaluate the type and extent of native salt-tolerant vegetation, the degree and extent of disturbance by invasive nuisance species and mechanical and other activities, the protective value to adjacent structures and natural plant communities, the protective value to the beach and dune system, and the impacts to marine turtle nesting and hatchlings. The Department shall restrict activities that lower the protective value of natural and intact beach and dune, coastal strand, and maritime hammock plant communities. Activities that result in the removal of protective root systems or reduce the vegetation's sand trapping and stabilizing properties of salt tolerant vegetation are considered to lower its protective value. Construction shall be located, where practicable, in previously disturbed areas or areas with non-native vegetation in lieu of areas of native plant communities when the placement does not increase adverse impact to the beach and dune system. Planting of invasive nuisance plants, such as those listed in the Florida Exotic Pest Plant Council's 2005 List of Invasive Species – Categories I and II, will not be authorized if the planting will result in removal or destruction of existing dune-stabilizing native vegetation

or if the planting is to occur on or seaward of the dune system. A copy of this list is available on the Internet at www.fleppc.org; or can be obtained by writing to the Department of Environmental Protection, 2600 Blair Stone Road, MS 3522, Tallahassee, Florida 32399-2400; or by telephoning (850)245-8336. Special conditions relative to the nature, timing, and sequence of construction and the remediation of construction impacts shall be placed on permitted activities when necessary to protect native salt-tolerant vegetation and native plant communities. A construction fence, a designated location for construction access or storage of equipment and materials, and a restoration plan shall be required if necessary for protection of existing native salt-tolerant vegetation during construction.

(12) Special conditions relative to the nature, timing, and sequence of construction shall be placed on permitted activities when necessary to protect marine turtles and their nests and nesting habitat. In marine turtle nesting areas, all forms of lighting shall be shielded or otherwise designed so as not to disturb marine turtles. Tinted glass or similar light control measures shall be used for windows and doors which are visible from the nesting areas of the beach. The Department shall suspend any permitted construction when the permittee has not provided the required protection for marine turtles and their nests and nesting habitat.

Rulemaking Authority 161.052(11), 161.053(20), 161.085(5) FS. Law Implemented 161.052(2), 161.053(2), (4), (5), (6), (12), (17), (18), 161.085(1), (2)

FS. History – New 11-18-80, Amended 3-17-85, 11-10-85, Formerly 16B-33.05, 16B-33.005, Amended 9-12-96, 1-26-98, 8-27-00, 613-04, 5-31-07.

62B-33.024 Thirty-Year Erosion Projection Procedures (2007).

(1) A 30-year erosion projection is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-year erosion projection of the seasonal high water line (SHWL) shall be made by the Department on a site specific basis upon receipt of an application with the required topographic survey, pursuant to Rules 62B-33.008 and 62B-33.0081, F.A.C., for any activity affected by the requirements of Section 161.053(5), F.S. An applicant may submit a proposed 30-year erosion projection for a property, certified by a professional engineer licensed in the state of Florida, to the Department for consideration.

(2) A 30-year erosion projection shall be determined using one or more of the following procedures:

(a) An average annual shoreline change rate in the location of the mean high water line (MHWL) at a Department reference survey monument shall be determined and multiplied by 30 years. The resulting distance shall be added landward of the SHWL located on the application survey. The rate shall be determined as follows:

1. The shoreline change rate shall be derived from historical shoreline data obtained from coastal topographic surveys and maps, controlled aerial photography, and similar sources approved by the Department. Data from periods of time that clearly do not represent current prevailing coastal processes acting on or likely to act on the site shall not be used.

2. The shoreline change rate shall include the zone spanned by three adjacent Department reference monuments on each side of the site. A lesser or greater number of reference monuments can be used as necessary to obtain a rate representative of the site, and a rationale for such use shall be provided.

3. In areas that the Department determines to be either stable or accreting, a minus one-foot per year shoreline change rate shall be applied as a conservative estimate.

(b) If coastal armoring is present at the site, the Department shall determine whether or not the 30-year erosion projection shall stop at the armoring. The applicant shall provide scientific and engineering evidence, including a report with data and supporting analysis certified by a professional engineer licensed in the state of Florida, which verifies that the armoring has been designed, constructed, and maintained to survive the effects of a 30-year storm and has the ability to stop erosion of the MHWL for 30 years. The Department shall waive the requirement for the applicant to

provide scientific and engineering evidence if the Department determines the information is not necessary in order to make the erosion projection determination.

(c) Some shoreline areas, such as those adjacent to or in the vicinity of inlets without jetty structures, can experience large-scale beach-width fluctuations with or without net erosional losses. Other beach areas can fluctuate greatly due to the observed longshore movement of large masses of sand, sometimes referred to as sand waves. In these areas, a 30-year erosion projection shall be estimated from the available data at the SHWL landward limit of the large beach-width fluctuations within the last 100 years.

(d) Beach nourishment or restoration projects shall be considered as follows:

1. Future beach nourishment or restoration projects shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted.

2. Existing beach nourishment or restoration projects shall be considered to be either a one-time beach construction event or a long-term series of related sand placement events along a given length of shoreline. The Department shall make a determination of remaining project life based on the project history, the likelihood of continuing nourishments, the funding arrangements, and consistency with the Strategic Beach Management Plan adopted by the Department for managing the state's critically eroded shoreline and the related coastal system.

3. The MHWL to SHWL distance landward of the erosion control line (ECL) shall be determined. If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL. The pre-project SHWL shall be located by adding the MHWL to the SHWL distance landward of the pre-project MHWL (usually the ECL). The remaining project life, which is the number of years the restored beach MHWL is expected to be seaward of the ECL, shall be subtracted from the 30 years as a credit for the nourishment project. The non-credited remaining years times the pre-project shoreline change rate for the site yields the 30-year projection distance landward of the pre-project SHWL.

4. If the Department is unable to scientifically determine a pre-project erosion rate due to a lack of pre-project data, the Department shall set the 30-year erosion projection along an existing, reasonably continuous, and uniform line of construction that has been shown to be not unduly affected by erosion.

(e) The 30-year erosion projection shall extend no farther landward than the coastal construction control line (CCCL). In the event that the plane of the seasonal high water elevation does not intercept the upland terrain on the site, the 30-year erosion projection shall stop at the CCCL, unless it is determined to be stopped by armoring as described in paragraph 62B-33.024(2)(b), F.A.C.

(f) When the Department approves a permit for new, repaired, or significantly modified coastal structures or activities that affect the lateral movement of sand along the shore, the change in site conditions can significantly affect the future shoreline location. In these areas, if the Department is unable to use historic data to determine a 30-year erosion projection, the Department shall make a 30-year erosion projection assessment based on the best available information and shall provide the rationale to all interested parties.

(g) If a specific shoreline change rate for a 30-year erosion projection has not yet been determined for a given area, but the Department can determine that a proposed structure is sufficiently landward such that it will not likely be affected by a worst case erosion projection estimate, then the proposed structure shall be considered as being landward of the 30-year erosion projection. Such an estimate shall be based on the topography, geomorphology, the erosion experienced at the site thus far, the sand supply situation, and any other applicable coastal engineering factors.

(h) In the event the Department is unable to make a site specific 30-year erosion projection following the procedures in this rule section, the Department shall make an assessment based on the best available information and shall provide the rationale to all interested parties.

(3) The Department shall continue to develop, maintain, and update a database of shoreline data for assistance in making 30-year erosion projections.

Rulemaking Authority 161.053(20) FS. Law Implemented 161.053(5) FS. History – New 11-10-85, Formerly 16B-33.24, 16B-33.024, Amended 1-26-98, 6-13-04, 5-31-07.

62B-33.024 Thirty-Year Erosion Projection Procedures (2004).

(1) A 30-year erosion projection is the projection of long-term shoreline recession occurring over a period of 30 years based on shoreline change information obtained from historical measurements. A 30-year erosion projection of the seasonal high water line (SHWL) shall be made by the Department on a site specific basis upon receipt of an application with the required topographic survey, pursuant to Rules 62B-33.008 and 62B-33.0081, F.A.C., for any activity affected by the requirements of Section 161.053(6), F.S. An applicant may submit a proposed 30-year erosion projection for a property, certified by a professional engineer licensed in the state of Florida, to the Department for consideration.

(2) A 30-year erosion projection shall be determined using one or more of the following procedures:

(a) An average annual shoreline change rate in the location of the mean high water line (MHWL) at a Department reference survey monument shall be determined and multiplied by 30 years. The resulting distance shall be added landward of the SHWL located on

the application survey. The rate shall be determined as follows:

1. The shoreline change rate shall be derived from historical shoreline data obtained from coastal topographic surveys and maps, controlled aerial photography, and similar sources approved by the Department. Data from periods of time that clearly do not represent current prevailing coastal processes acting on or likely to act on the site shall not be used.

2. The shoreline change rate shall include the zone spanned by three adjacent Department reference monuments on each side of the site. A lesser or greater number of reference monuments can be used as necessary to obtain a rate representative of the site, and a rationale for such use shall be provided.

3. In areas that the Department determines to be either stable or accreting, a minus one-foot per year shoreline change rate shall be applied as a conservative estimate.

(b) If coastal armoring is present at the site, the Department shall determine whether or not the 30-year erosion projection shall stop at the armoring. The applicant shall provide scientific and engineering evidence, including a report with data and supporting analysis certified by a professional engineer licensed in the state of Florida, which verifies that the armoring has been designed, constructed, and maintained to survive the effects of a 30-year storm and has the ability to stop erosion of the MHWL for 30 years. The Department shall waive the requirement for the applicant to

provide scientific and engineering evidence if the Department determines the information is not necessary in order to make the erosion projection determination.

(c) Some shoreline areas, such as those adjacent to or in the vicinity of inlets without jetty structures, can experience large-scale beach-width fluctuations with or without net erosional losses. Other beach areas can fluctuate greatly due to the observed longshore movement of large masses of sand, sometimes referred to as sand waves. In these areas, a 30-year erosion projection shall be estimated from the available data at the SHWL landward limit of the large beach-width fluctuations within the last 100 years, plus the application of a net erosion rate, as described in paragraph 62B-33.024(2)(a), F.A.C., if such can be determined from the available data.

(d) Beach nourishment or restoration projects shall be considered as follows:

1. Future beach nourishment or restoration projects shall be considered as existing if all funding arrangements have been made and all permits have been issued at the time the application is submitted.

2. Existing beach nourishment or restoration projects shall be considered to be either a one-time beach construction event or a long-term series of related sand placement events along a given length of shoreline. The Department shall make a determination of remaining project life based on the project history, the likelihood of continuing nourishments, the

funding arrangements, and consistency with the Strategic Beach Management Plan adopted by the Department for managing the state's critically eroded shoreline and the related coastal system.

3. The MHWL to SHWL distance landward of the erosion control line (ECL) shall be determined. If the ECL is not based on a pre-project survey MHWL, then a pre-project survey MHWL shall be used instead of the ECL. The pre-project SHWL shall be located by adding the MHWL to the SHWL distance landward of the pre-project MHWL (usually the ECL). The remaining project life, which is the number of years the restored beach MHWL is expected to be seaward of the ECL, shall be subtracted from the 30 years as a credit for the nourishment project. The non-credited remaining years times the pre-project shoreline change rate for the site yields the 30-year projection distance landward of the pre-project SHWL.

4. If the Department is unable to scientifically determine a pre-project erosion rate due to a lack of pre-project data, the Department shall set the 30-year erosion projection along an existing, reasonably continuous, and uniform line of construction that has been shown to be not unduly affected by erosion.

(e) The 30-year erosion projection shall extend no farther landward than the coastal construction control line (CCCL). In the event that the plane of the seasonal high water elevation does not intercept the upland terrain on the site, the 30-year erosion projection shall stop at the CCCL, unless it is determined to

be stopped by armoring as described in paragraph 62B-33.024(2)(b), F.A.C.

(f) When the Department approves a permit for new, repaired, or significantly modified coastal structures or activities that affect the lateral movement of sand along the shore, the change in site conditions can significantly affect the future shoreline location. In these areas, if the Department is unable to use historic data to determine a 30-year erosion projection, the Department shall make a 30-year erosion projection assessment based on the best available information and shall provide the rationale to all interested parties.

(g) If a specific shoreline change rate for a 30-year erosion projection has not yet been determined for a given area, but the Department can determine that a proposed structure is sufficiently landward such that it will not likely be affected by a worst case erosion projection estimate, then the proposed structure shall be considered as being landward of the 30-year erosion projection. Such an estimate shall be based on the topography, geomorphology, the erosion experienced at the site thus far, the sand supply situation, and any other applicable coastal engineering factors.

(h) In the event the Department is unable to make a site specific 30-year erosion projection following the procedures in this rule section, the Department shall make an assessment based on the best available information and shall provide the rationale to all interested parties.

(3) The Department shall continue to develop, maintain, and update a database of shoreline data for assistance in making 30-year erosion projections.

Specific Authority 161.053 FS. Law Implemented 161.053(6) FS. History – New 11-10-85, Formerly 16B-33.24, 16B-33.024, Amended 1-26-98, 6-13-04.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D14-3307

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION,

Appellant,

-vs-

BEACH GROUP
INVESTMENTS, LLC,

Appellee.
____________________________/

MOTION FOR REHEARING

(Filed Sep. 7, 2016)

Appellee, BEACH GROUP INVESTMENTS, LLC, by and through undersigned counsel, hereby files this Motion for Rehearing pursuant to Rule 9.330. This Court should rehear its Opinion because it applied an incorrect standard of review contrary to established case law, inferred the availability of a variance based on an equivocal reference in a footnote of an administrative order (while ignoring contradictory discussion in the actual body of the same administrative order), and made a material factual error in its Opinion on a point that was not disputed at trial.

Introduction

In ruling that reversal was compelled solely on the grounds of ripeness, this Court overlooked the following critical considerations:

1) The specific factual finding of the trial court that an application for a variance would have been futile based on the history between the parties and statements of the Department, which factual finding should have been reviewed on a substantial evidence standard and should have satisfied the ripeness requirement, even in light of this Court's legal rulings regarding the theoretical availability of a variance;

2) Extensive and explicit evidence that the Department believed that a variance was **not** available to Beach Group based on the statutory requirements and state policy and thus, despite this Court's determination that, as a matter of law, a variance was theoretically available, a request for such a variance nine years ago (after the ALJ ruling) would have been futile; and

3) A critical provision of the governing statute, §161.053(5)(d), Fla. Stat., limiting the Department's authority to consider renourishment programs in projecting future erosion, and specifically noted by the ALJ as being "arguably contrary" to Beach Group's request to consider the beach renourishment (which would have been fatal to a variance because it would have conflicted with the statute).

As to its alternative holding (that Beach Group was required on ripeness grounds to have applied for less-intensive developments), this Court made a highly significant factual error and then confused a "ripeness" issue with a "taking" issue as demonstrated by the very case law cited by the Court. The Department had reached a **final decision** on the calculation of the set-back requirement for the property. Thus, whether the alternative projects deprived the landowner of meaningful economic use of the property then became solely a "taking" issue, and certainly not a "ripeness" issue.

Consideration of these matters should compel a rehearing of the decision to correct the injustice suffered by Beach Group, which has lost the property and now has no means available to seek a theoretical variance.

<u>This Court Did Not Review the Trial Court's Factual Finding Under the Competent and Substantial Evidence Standard.</u>

This Court overlooked the trial court's factual finding below demonstrating that a request for a variance by Beach Group would have been futile. Futility provides an independent basis for upholding the ripeness of Beach Group's claim, and should have been reviewed under the substantial and competent evidence standard, not *de novo*. *See McKee v. City of Tallahassee*, 664 So.2d 333, 334 (Fla. 1st DCA 1995) ("because competent, substantial evidence supports the conclusion of the trial court that the inverse condemnation action

was not 'ripe,' we affirm"). While certainly the ripeness standard involves issues of law, this Court has specifically noted in the context of inverse condemnation that "decisions on ripeness issues are fact-sensitive." *City of Riviera Beach v. Shillingburg*, 659 So.2d 1174, 1180 (Fla. 4th DCA 1995).

Florida Courts give considerable weight to the statements of prospective decision-makers on future applications or variances as being highly probative of the futility issue. *E.g. McKee*, *supra* (in reaching its determination on factual futility the court stated "we place great weight on the numerous assurances by city officials" that a subsequent variance application would receive favorable consideration); *Tinnerman v. Palm Beach County*, 641 So.2d 523, 526 (Fla. 4th DCA 1994) (in determining ripeness the court specifically notes comments made by commissioners that they would be receptive to alternative uses of the property); *Koontz v. St. John's River Water Management District*, 720 So.2d 560, 562 (Fla. 5th DCA 1998) (in reversing trial court's determination that inverse commendation claim was not ripe, court relies on, *inter alia*, comment of member of the water management district indicating that, after initial application was rejected, owners should just pursue their legal remedies).

This Court rejected the lower court's determination of ripeness, concluding that the trial judge erroneously construed the governing statute to preclude a variance, and that the trial judge incorrectly determined that one "meaningful application" satisfied the

ripeness requirement.[1] Respectfully, that was not the trial court's entire analysis. This Court's Opinion does not mention the additional factual determination that a request for variance would have in fact been **futile**, which was sufficient to satisfy the ripeness requirement even in light of this Court's legal determination that a variance was theoretically available. The trial court's discussion of ripeness in its order is as follows:

> The FDEP raised the defense of ripeness at trial, arguing that Beach Group's claim is not yet ripe because Beach Group did not submit an application for a variance after the permit was denied. Beach Group, however, submitted a meaningful permit application. *See Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 573 (Fla. 4th DCA 2002) (one "meaningful" application required for ripeness). Additionally, the requirement for a Coastal Construction Control Line permit is dictated by statute, and not by rule. *See* Fla. Stat. §§120.542 and 161.053. **The Court finds, moreover, that, based on the evidence of the history between the parties and the stated views of the FDEP, it would have been futile for Beach Group to have separately applied for a variance.** *See Taylor v. Riviera Beach*, 801 So.2d 259, 263 (Fla. 4th DCA 2001). [Emphasis added.]

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[1] Significantly, it was undisputed at the trial court below that Beach Group had submitted a "meaningful" application (R3:472).

That latter statement tracks the analysis expressly authorized by this Court in other cases. *See Shillingburg*, *supra*, at 659 So.2d at 1181 (futility can be shown by past history); *Lost Tree Village Corp.*, *supra*, 838 So.2d at 573 (futility shown can be "in light of past history or the expressly stated view of the appropriate government entities"). Here, there is extensive evidence supporting the trial court's factual finding that it would have futile for Beach Group to seek a variance. Indeed, the Department repeatedly took the position with Beach Group that statutory considerations precluded any flexibility in considering the likelihood of future beach nourishment.

For example, in correspondence to Beach Group's Engineer, the Department stated (R5:117):

> In accordance with Section 161.053(6), F.S., **staff cannot recommend approval for the project if the major structures are seaward of the estimated erosion projection.** We suggest that you redesign the project to remain sited landward of the 30-year erosion projections. [Emphasis added.]

Subsequently, the Department stated, with respect to §161.053, Fla. Stat., that the Beach Group project involved major structures sited seaward of the 30-year estimated erosion projection, and that **"no mitigation or minimization can offset the 30-year erosion line prohibition"** (R5:891). This was consistent with State policy as established by the High Hazard Study which directed the Department to strengthen the setback requirements for the CCCL Program even though

it meant "restricting a property owners' ability to construct on a parcel" and could result in "potential increased takings claims" (R5:733).

Additionally, the Department's final order concluded (R5:857):

> The proposed major structures are located seaward of the 30-year erosion projection of the SHWL. **Pursuant to Chapter 161.053(6)(b), F.S., the department shall not issue any permit for any structure**, other than a coastal or shore protection structure, minor structure, or pier, meeting the requirements of this part, or other than intake and discharge structures for a facility sited pursuant to Part II of Chapter 403, **which is proposed for a location which, based on the department's projections of erosion in the area, will be seaward of the seasonal highwater line (SHWL)**. Therefore, the proposed major structures are ineligible for a coastal construction control line permit. [Emphasis added.]

That statement does not indicate any willingness on the part of the Department to exercise its discretion to grant a variance to permit the construction of Beach Group's project.

At trial, the Department official in charge of processing CCCL applications, Tony McNeal, repeatedly testified that the Department did not believe that Beach Group's project met the requirements of the statute (R13:184, 237, 239). He claimed, however, that

this did not necessarily mean the Application violated the purpose or intent of the statute, and therefore a variance might be available to Beach Group. However, McNeal was impeached at trial with his prior deposition testimony. After stating that Beach Group's application violated the statute, he was asked **"[A]nd obviously you didn't think that at the time [of the permit's denial] it met the intent of the statute either?"**; and he testified "[A]t the time, that's correct" (R13:186-87, A5-6).[2] That statement is critically significant because §120.542, Fla. Stat., does not allow a variance unless the purpose of the statute can be satisfied.

McNeal's trial testimony was further impeached by his correspondence with a subsequent owner of the Beach Group property (R5:866-67) several years after footnote 13 in the ALJ order on which this Court relies in its Opinion. McNeal wrote:

> As requested, attached is a copy of the survey for the property submitted in 2006, which shows the approximate location of the (2010) erosion projection. The DEP cannot issue permits for major structures except single-family dwellings located seaward of said line.

The landowner wrote back asking: **"Any opportunity for variance to accommodate prior plan of 2004**

[2] At trial, McNeal admitted that he had not received any additional information on Beach Group's project after his deposition that would have changed his mind (R13:187). To provide McNeal's testimony in context, pages 182-187 of the trial transcript are attached hereto (A1-6).

[i.e. the Beach Group plan]?" McNeal then responded: **"This is state law, which you cannot obtain a variance from."** (*Id.*; emphasis supplied).

Additionally, in September of 2006, representatives of Beach Group met with Department officials in Tallahassee, including the same people who would rule on any variance for the project. At that meeting the Department stated unequivocally that it would "not revisit" its approach to projecting erosion on the property (R5:850-54). Mr. Seltzer, Chief Operations officer for Beach Group, testified that "they [had] no intention of allowing this project to proceed," and that a variance would be futile because it would be "decided upon by the very people who had just finished telling us . . . that they were absolutely under no circumstances going to issue us a permit" (R15:429-30). Beach Group's engineer also testified that "it was quite clear to us very quickly in that meeting" that there were no other means to resolve the matter with the Department (R14:298-99).

After that meeting, Beach Group's engineer communicated with the Administrator for the Bureau of Beaches and Coastal Systems, Gene Chalecki, regarding whether the Department would consider the likelihood of future beach renourishment in its erosion projection (R14:359-61; R5:850-54); but Chalecki responded that the Department would not reconsider its calculation and would stand by its method of projecting erosion (R14:303-06; R15:431-32).

Based on this evidence, the trial court's factual determination that an application for variance would be futile based on the history of the project and the stated reviews of Department officials must be upheld, because there was competent and substantial evidence to support it. While this Court correctly reviewed the legal issues regarding ripeness *de novo*, its determination that a variance was theoretically available to Beach Group simply does not resolve the factual issue of whether a request for the variance would have been futile. The trial court expressly made that "fact-sensitive" determination here, and this Court's Opinion overlooks it and disregards the extensive evidence supporting it.

The Footnote in the Administrative Order Cannot Reasonably be Construed to Refute Futility as a Matter of Law.

Rather than reviewing the trial court's "fact-sensitive" analysis of ripeness in this case, this Court's Opinion instead focuses on a footnote in the administrative order as some support that the Department could have, at least in theory, granted a valance. However, this approach ignores contradictory language in the same administrative order raising grave doubts as to the legal availability of a variance both in 2007 (when Beach Group still owned the property) and today. Simply put, per the ALJ opinion, there are statutory constraints on the Department's ability to consider the likelihood of future beach renourishment. Thus, the calculation of future erosion is not purely a

function of the administrative rule (such that a valance could theoretically be available), as the Department now contends, after taking the opposite position during its dealings with Beach Group and the subsequent property owner.

While the ALJ suggested in footnote 13 of his order that the likelihood of continued beach nourishment "**might** be appropriate for consideration in the context of a request for a variance or waiver under § 120.542, Fla. Stat." (emphasis added to show the express equivocation by the ALJ), he also noted earlier in his order that such consideration was, **"arguably, contrary to §161.053(6)(d), Fla. Stat."** [that subsection is now subsection(5)(d)] (ALJ Order p.28, A34). The ALJ made that statement in the context of Beach Group's argument that the renourishment of the beach at the location of the project should be considered because it was unlikely that state, federal, or local governments would allow other structures located along the beach "to simply fall into the Atlantic Ocean." *Id.* But if such consideration would violate subsection (5)(d) of the statute, no variance could be granted, because §120.542(1) and (2), Fla. Stat., provide that an agency cannot grant a variance from a statutory provision.

Thus, in essentially basing its Opinion on footnote 13, this Court overlooked a subsection of §161.053, Fla. Stat., which directly addresses beach nourishment and wholly undermines the availability of any variance. Subsection (5)(d) of §161.053, Fla. Stat., provides:

> In determining the land area that will be below the seasonal high-water line within 30 years after the permit application date, **the department shall consider** the effect on erosion rates of **an existing beach nourishment or restoration project** or of a beach nourishment or restoration project **for which all funding arrangements have been made and all permits have been issued** at the time the application is submitted. [Emphasis added.]

It is a well-settled principle of statutory construction that, when a statute "expressly describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." *Prewitt Management Corp. v. Nikolits*, 795 So.2d 1001, 1005 (Fla. 4th DCA 2001). Here the statute sets out the circumstances under which beach renourishment projects can be considered; therefore, it must be construed to reject consideration of it under other circumstances. It is undisputed that the renourishment projects applicable to Beach Group's property had **not** been funded or permitted for the next 30 years at the time of the Application.

As this Court notes, the Department is not authorized to grant a variance from the requirements of a statute. That is what would have been necessary here based on subsection §161.053(5)(d), Fla. Stat. Indeed, that statutory subsection shows why the Department denied Beach Group any flexibility on its erosion calculation, and also shows why the Department told the

subsequent owner of the property in 2010 that no variance was available. Leaving aside the obviously equivocal nature of footnote 13 ("might"), the contradictory statement regarding subsection (5)(d) elsewhere in the administrative order demonstrates at the very least why this Court should not rely on the footnote to reject the trial court's futility finding as a matter of law. To treat the ripeness issues as solely a matter of law is inconsistent with the "fact-sensitive" nature of the issue and would create decisional conflict with, *inter alia*, *McKee*, *supra*.

The trial court's determination on the fact-sensitive issue of futility should have been upheld because it was supported by competent and substantial evidence.

This Court's Alternative Holding is Flawed Both Factually and Legally.

This Court concludes that the case was not ripe for a second reason, because Beach Group did not propose an alternative development plan for the property. In the context of that discussion, this Court states that a single family residence was one alternative for development of the property. The record, however, conclusively demonstrates the contrary. The property at issue was not zoned for single-family residential construction (T498), a fact not disputed at trial. Indeed, the Department itself noted at trial that its land use expert had improperly included information relating to use of the property as a single family residence in his exhibits

and that the inclusion of that information was a "faux pas" (T665). As a result, the Department did not oppose Beach Group's motion to strike that portion of the exhibit, because the property was not capable of being utilized for a single family residence (T665-67).

This Court states that "Beach Group's former attorney suggested a single family residence as an alternate development on the property," (Op. p.10) which is false. The only reference that William Hyde, Beach Group's former attorney, made regarding a single family residence was in discussing why he did not believe a variance was available to Beach Group (T459-461, A44-46). In the excerpt of his video deposition, he testified that he did not believe a variance was available to Beach Group because under the statute, §161.053 (T460-61, A45-46):

> "[T]he only thing that you can site seaward of a duly established erosion control line is a single family dwelling. It is very precise in that regard. There is no exception to it beyond that."

Mr. Hyde did **not** suggest that a single-family residence was a viable project for the property. Beach Group recognizes that the trial court misconstrued Mr. Hyde's testimony in its oral ruling (R7-1240), but there is absolutely no evidence that a single-family residence was feasible or permissible; indeed, as noted above, the evidence was undisputed that the local land use regulations did **not** permit a single-family residence on the property.

More importantly, this Court's alternative holding inaccurately conflates the concepts of "ripeness" and a "taking." The classic statement of ripeness is derived from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985):

> [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

[*quoted* in *Alachua Land Investors, LLC v. City of Gainesville*, 107 So.3d 1154, 1158-59 (Fla. 1st DCA 2013)]. Here, the Department determined the manner in which the statute and regulations relating to the calculation of the erosion control line were to be applied, thereby determining the setback requirements for the property. Putting aside the variance issue here, the Department had determined with finality how much of the property could be utilized for development.

This Court's alternative holding, however, suggests that Beach Group had an obligation to submit alternative development plans anyway as part of the ripeness requirement. As noted by the United States Claims Court (which addresses more taking claims than any other court):

> The ripeness requirement should not oblige a landowner to seek a permit for a development proposal that it does not deem economically

> viable and, hence, does not intend to undertake. To the extent that the government disagrees with the landowner's conclusion as to the economic viability of development proposals left open by an agency decision, it can present its arguments to the court considering the merits of the taking claim.

Buere-Co. v. United States, 16 Cl. Ct. 42, 51 n.11 (1988); *Devon Energy Corp. v. United States*, 45 Fed. Cl. 519, 528 (Fed. Cir. 1999) (quoting same language).

The Fifth District followed the principle in *Koontz*, *supra*, where it reversed a trial court's determination that the landowner's claim was not ripe. The court stated (720 So.2d at 562):

> If the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain an approval, the issue is ripe. The owner in this case drew a line in the sand and told the District: "I can go no further." Whether the owner can now convince the court that there has, in fact, been a taking is the issue properly before the trial court. [Footnote deleted.]

See also *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377, 1388 (Fla. 4th DCA 1994), where this Court held:

> Once Yardarm had made a definite and meaningful effort to obtain City approval for its eighteen story hotel and Pompano Beach had

> evinced an intention not to give it, Yardarm's claim was ripe.

Thus, this Court's ruling on this issue creates decisional conflict with *Koontz*.

In fact, this Court's Opinion requiring the submission of alternative plans for the property relies on a statement of law regarding "taking" and not "ripeness." This Court quoted *Alachua Land Investors*, *supra* 107 So.3d at 1119, for the proposition that "the mere fact that the denial of a permit deprives a property owner of a particular use the owner deems most profitable or preferable **does not demonstrate a taking**." [E.S.] Significantly the other two cases cited for that proposition also involved "taking" issues, and do not discuss "ripeness" issues. *See McDonald, Summer and Frates v. Yolo County*, 477 U.S. 340 (1986); *Leto v. State of Florida Department of Environmental Protection*, 824 So.2d 283 (Fla. 4th DCA 2002). Here, the critical determination was the setback issue resulting from the determination of the erosion control line, and that had been determined with finality (putting aside, for this issue, the question of the availability of a variance).

As Beach Group demonstrated at trial, its proposed development was impossible based on the setbacks, and Beach Group believed that its other options would have been economically devastating if pursued within the land remaining after the Department's new setbacks (R16:496-97, 541-42). Significantly, this Court expressly recognized as much in footnote 5 of its Opinion, noting that the effect of the Department's rule

change reduced Beach Group's profitability for the proposed project by 96%. This Court further noted that a six-unit condominium complex would result in a 90% loss of profitability "which did not include the cost of land acquisition." *Id.* Thus, as this Court recognized, "the property had some value, but smaller development would cause a loss." That degree of loss justifies consideration of the taking issue under *Penn Central Transportation v. City of New York*, 438 U.S. 104 (1978), and cannot justify a conclusion that Beach Group failed to demonstrate ripeness because it did not present alternative development plans.

Therefore, for the reasons stated above, this Court should grant the Appellee's Motion for Rehearing.

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on September 7, 2016.

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D14-3307

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Appellant,

-vs-

BEACH GROUP INVESTMENTS, LLC,

Appellee. /

APPENDIX TO MOTION FOR REHEARING

(Filed Sep. 7, 2016)

1. Mr. McNeal's Testimony Excerpt from trial, dated April 23, 2013 A1-6

2. ALJ Order, dated April 19, 2007 A7-43

3. Mr. Hyde's Testimony Excerpt from trial, dated April 24, 2013 A44-46

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on September 7, 2016.

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[182] variance petition should have been pursued; is that right?

A. It could have been pursued.

Q. Okay. And that a variance – even though y'all were saying that you wouldn't revisit the analysis, correct?

A. The 30-year erosion, we were saying that we, the size was what it was. We looked at the size, looked

at the numbers. We had visited more than once already. There was no need to revisit the size again about those projections.

Q. But, of course, you didn't tell them at that meeting that a variance proceeding basically would change the outcome of anything, did you?

A. We said that they could have pursued a variance from the rule as to the starting line from where we started the projection, the erosion control line versus the preproject mean high water line.

Q. But you didn't indicate to them to the effect that a variance would be favorably received, did you?

A. We could, we said the statute allows for that. In fact, that's why there is a variance process in place to deal with certain rules that are unique to your project and causing you a hardship.

Q. I don't think you're still answering my [183] question. Listen to it carefully.

You did not indicate that a variance would be favorably received or that would you grant a variance, did you?

A. We could not make that statement.

Q. And why is did you can't tell someone that a variance might be favorably received?

A. Because the applicant has to petition for a variance and put forth the arguments to substantiate they want a variance.

Q. You can't ever tell someone, for example, that e-mails you that you are not going to give them a variance or that a variance would not be a good idea or that a variance would be a waste of their time?

A. We would not do that.

Q. And you have to file a separate petition for a variance, don't you?

A. Yes, you do.

Q. And you have to show a substantial hardship, right?

A. Yes, sir.

Q. And you have to show that it would still meet the underlying intent of the statute?

A. That's correct.

Q. And part of the governing statute here is the [184] 30-year erosion projections, isn't it?

A. Yes, sir.

Q. And the Beach Group from the Department's perspective was not complying with the section dealing with the 30-year erosion projections?

A. That's correct.

Q. And you can't get a variance from compliance with the statute, can you?

A. You cannot.

Q. And in fact, I think there are previous memos that basically were done at the Department, internal memos that summer that indicated that because of the fact that this new line was being adopted, you did not believe that the Beach Group was in compliance, correct?

You did not believe that it met the requirements of the statute?

A. That's correct. But that's different than being the intent of the statute.

Q. Well, the reason that you basically denied it at the time, the reason you denied the permit at the time was because you didn't think it met either the letter or intent of the statute?

A. It didn't meet the requirements of the statute and rule.

Q. I think you testified previously that it [185] didn't meet the letter or intent of the statute; is that correct?

A. If that's what I testified to. I don't recall the specific words.

Q. Okay. Would you like to see them?

A. Sure.

Q. And you haven't received any new information about this, have you, any new information that would cause you today to decide that a variance could be granted?

A. Well, we are in the process of amending the 30-year erosion projection rule to allow some relief in cases like this whereas it can be demonstrated that the beach would be maintained seaward of the water control line even though it's not set based on the preproject mean high water line.

Q. But that wasn't in place back then, was it?

A. The variance process was in place to get relief from that rule, but not the proposed amendments.

Q. I understand the variance process was in place and we've already talked about that, but in regard to this new process you are talking about that would provide some relief, that wasn't in place at the time, right?

A. No, sir.

[186] Q. Why is it you all are considering that now?

A. We are undergoing amendments to the entire rule, 62B-33. And in case we thought there were, even though the ECL was not based on just preproject mean high water line, but there has been demonstration that sand is going to be seaward of the erosion control line, then there should be relief provided.

Q. I was asking you at the time of your deposition, "And the reason you all denied this permit is because [sic] didn't think that it met the statute?"

And your answer was "That's correct."

A. The requirements of the statute.

Q. Well, my question to you at the time was, "And the reason you all denied this permit is because you didn't think it met the statute?"

A. That's correct.

Q. And your answer was "That's correct."

A. That's correct.

Q. And I asked you again, "And not only it didn't meet the letter of the statute, right? It actually did not meet the letter of what the statute required?"

And you said, "That's correct."

A. That's still correct. Does not meet the letter of what the statute required.

Q. And I said, "And obviously you didn't think [187] that at the time it met the intent of the statute either?"

And you said, "At the time, that's correct." Right?

A. Yes.

Q. So at the time you didn't think it met the letter or intent of the statute, but now you have decided that it does meet the intent of the statute; is that right?

A. They can put forth an argument in a petition to demonstrate it does.

Q. And nothing has changed in regard to the amount of information you have received. You have the

same information today as you did back then, right? You haven't received any more information –

A. About this project?

Q. Yes, sir.

A. No, sir.

Q. That would make you change your mind. The only thing that's changed is that we filed a lawsuit, right?

A. And we were asked to go back and revisit the rules to see what needs to be amended.

Q. Okay. And you've indicated that you all might do a process or start a process now that would basically

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[459] "A. Yes. It adopted the final order essentially adopting in toto the administrative law judge's recommended order and issued its own final order denying the permit application.

"Q. At this stage of the process that you have been describing for us, Mr. Hyde, was it apparent to you that Beach Group had made several efforts to reach a resolution with DEP?

"A. Oh, yes. I think we had made several very earnest recommendations, and to no avail.

"Q. At any time during the process of which you were involved, did you receive any indication or suggestion from DEP that it would change its mind?

"A. No. And believe me, I tried.

"Q. Okay. And at the beginning of that paragraph, you said you had several phone conversations with Kelly Russell. How – how many phone conversations were there?

"A. I don't recall precisely. This was several years ago and I was working with Kelly on various matters, not – not just this one.

"Q. Uh huh. During those conversations, did you ever specifically ask her about the availability of a variance?

[460] "A. No, because I didn't think it was available legally.

"Q. You didn't legally think it was available?

"A. No.

"Q. You're aware that there is a provision in Chapter 120 –

"A. Yes.

"Q – for variances and waivers?

"A. Uh huh, but that provision in Chapter 120 applies only to variances from administrative rules, not statutes, and I don't think you can get a variance from Section 161.053.

"Q. That's correct, but you could get a variance from the rules that implement that if they – if it's appropriate, you could get one?

"A. I don't – I don't see how you could when the variance that you're requesting from the rule would require you to violate the statute.

"Q. And why, why would you be violating the statute?

"A. Well, the statute – the statute says very clearly – and I'm going to paraphrase it here, but it says very clearly that you can't – the only thing that you can site seaward of a [461] duly-established erosion control line is a single-family dwelling. It's very precise in that regard. There is no exception to it beyond that.

"And if you're saying, well, there is an administrative rule that says essentially the same thing, you can accomplish that result by just getting a waiver or a variance from the rule. But to get the variance from the rule means you're violating the statute. I don't see how you can do that.

"That has always been my understanding of the, the variance and waiver provisions in Chapter 120, which were enacted during the Governor Chiles administration. And I remember quite clearly the debate at that time.

"And it was almost a separation of powers thing, determination that the, an administrative agency

could allow a variance from its rules, but to allow variances from statutes would cause it to, you know, tread on the legislature's turf. And so that's why I don't think you can get a variance or waiver from a statutory provision.

"Q. Now during the administrative hearing, did you present to the ALJ this theory that the Department has changed its process and somehow that

* * *